Supreme Court, U.S.
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No. 07-711

IN THE

Supreme Court of the United States

In Re: KATRINA CANAL BREACHES
CONSOLIDATION LITIGATION
PERTAINS TO: INSURANCE
Xavier University, No. 06-516

XAVIER UNIVERSITY OF LOUISIANA,
Petitioner,

v.

TRAVELERS CASUALTY PROPERTY COMPANY
OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Fifth Circuit Court of Appeals erred when it failed to certify the sole question of law before it to the Louisiana Supreme Court when there was no dispute that the matter before it was governed exclusively by state law.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all the parties appearing here and before the United States Fifth Circuit Court of Appeals:

The Petitioners here and Appellees below are:

1. Gladys Chehardy
2. Daniel Fontanez
3. Jacqueline Fontanez
4. Larry Forster
5. Glenda Forster
6. Kenneth Maier
7. Judith Maier
8. Randy Gervais
9. Lori Gervais
10. Andre Mauberret
11. Marlin Mauberret
12. Debbie Strawn
13. Dave Strawn
14. Stephanie Boyd
15. Brad Boyd
16. New Orleans Flooring Supply, Inc.
17. Shawn Burst
18. Angelina Burst
19. Susan Brown (incorrectly identified as Patricia Brown in Amended Complaint)
20. Marie Fatheree
21. Katrina Daniels
22. Lionel Jones
23. Edna Jones
24. Karen Lewis
25. Shane Sylvester
26. Austra Zapata
27. Sabrina Perkins
28. Eldridge Pollard
29. Michael Peterson

30. Wendell Glation
31. Mack Barham
32. Richard Vanderbrok
33. Mary Jane Silva
34. Sophia Granier (a/k/a/ Madeline Granier)
35. James Capella
36. Jack Capella as the executor of the Succession of Lilian Cappella
37. Gregory Jackson
38. Peter Ascani, III
39. Robert G. Harvey, Sr.
40. Xavier University of Louisiana

The Respondents here and Appellants below are:

1. Great Northern Insurance Company
2. State Farm Fire & Casualty Company
3. Allstate Insurance Company
4. Allstate Indemnity Company
5. Lafayette Insurance Company
6. Liberty Mutual Fire Insurance Company
7. The American Insurance Company
8. Auto Club Family Insurance Company
9. Louisiana Citizens Property Insurance Company
10. Traveler's Property Casualty Company of America
11. The Standard Fire Insurance Company
12. Hartford Insurance Company of the Midwest
13. Lexington Insurance Company
14. Encompass Indemnity Company
15. AEGIS Security Insurance Company
16. Hanover Insurance Company
17. Unitrin Preferred Insurance Company

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
I. Facts and Procedural History	4
REASONS FOR GRANTING THE PETITION	8
I. THIS COURT HAS LONG RECOGNIZED THE BENEFITS TO CERTIFYING IMPORTANT ISSUES OF STATE LAW TO A STATE'S HIGHEST COURT	11
II. THE FIFTH CIRCUIT'S STATED REASONING FOR DENYING CERTIFICATION IS CONTRARY TO ITS OWN PRECEDENT	14
III. THE FIFTH CIRCUIT'S REFUSAL TO CERTIFY THE ISSUE ON APPEAL TO THE LOUISIANA SUPREME COURT IS IN CONFLICT WITH DECISIONS BY OTHER CIRCUIT COURTS OF APPEALS THAT HAVE CERTIFIED ISSUES OF INSURANCE POLICY INTERPRETATION TO A STATE'S HIGHEST COURT	19

TABLE OF CONTENTS—Continued

Page

IV. THE FIFTH CIRCUIT'S REFUSAL TO CERTIFY THE ISSUE ON APPEAL TO THE LOUISIANA SUPREME COURT IS IN CONFLICT WITH DECISIONS BY OTHER CIRCUIT COURTS OF APPEALS THAT HAVE CERTIFIED ISSUES OF INSURANCE POLICY INTERPRETATION TO A STATE'S HIGHEST COURT. 22

CONCLUSION 25

TABLE OF AUTHORITIES

CASES — Page

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 12-13
Bellotti v. Baird, 428 U.S. 132 (1976) 12-13
City of Burlington v. Indemnity Insurance Co. of North America, 332 F.3d 38 (2nd Cir. 2003) 23
Elkins v. Moreno, 435 U.S. 647 (1978) 11-12
Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004) 15
Lamar Homes, Inc. v. Mid-Continent Casualty Co., 428 F.3d 193 (5th Cir. 2005) 16
Lehman Bros. v. Schein, 416 U.S. 386 (1974) 12
OneBeacon Insurance Co. v. Don's Building Supply, Inc., 496 F.3d 361 (5th Cir. 2007) 17-18
Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) 13
United States Fidelity & Guaranty Co. v. Park 'n Go of Georgia, Inc., 66 F.3d 273 (11th Cir. 1995) 22
York Insurance Co. v. Williams Seafood of Albany, Inc., 223 F.3d 1253 (11th Cir. 2000) 22-23

RULES

LA. SUP. CT. R. XII 1, 9-10

TABLE OF AUTHORITIES—Continued

CASES Page

TABLE OF APPENDICES FOR PETITION OF WRIT OF CERTIORARI TO SUPREME COURT OF THE UNITED STATES

A. *In re Katrina Canal Breaches Consolidated Litigation*,466 F. Supp. 2d 729 (E.D. La. 2006) 1a
B. *In re Katrina Canal Breaches Litigation*, 495 F.3d 351 (5th Cir. 2007) 107a
C. Order on Petitions for Rehearing En Banc, *In re Katrina Canal Breaches Litigation*, No. 07-30119, United States Court of Appeals for the Fifth Circuit.... 169a
D. Xavier University of Louisiana's Motion to Certify Question to Louisiana Supreme Court, *In re Katrina Canal Breaches Litigation*,495 F.3d 351 (5th Cir. 2007) (No. 07-30119) 172a
E. Xavier University of Louisiana's Reply Memorandum to Appellant's Opposition to Motion to Certify Question to the Louisiana Supreme Court, *In re Katrina Canal Breaches Litigation*, 495 F.3d 351 (5th Cir. 2007) (No. 07-30119) 179a
F. Xavier University of Louisiana's Petition for En Banc Rehearing, *In re Katrina Canal Breaches Litigation*, 495 F.3d 351 (5th Cir. 2007) (No. 07-30119) 188a

TABLE OF AUTHORITIES—Continued

CASES Page

G. Xavier University of Louisiana's Motion for Stay of Mandate, *In re Katrina Canal Breaches Litigation*, 495 F.3d 351 (5th Cir. 2007) (No. 07-30119) 218a

H. Order Denying Motion to Stay Mandate, *In re Katrina Canal Breaches Litigation*, No. 07-30119, United States Court of Appeals for the Fifth Circuit 235a

I. December 5, 2006 Judgment and Reasons for Judgment, *Historic Restoration, Inc. v. RSUI Indemnity Co.*, No. 06-4990 (D)(16), Civil District Court for the Parish of Orleans, State of Louisiana 238a

J. February 9, 2007 Judgment, *Joseph Sher v. Lafayette Ins. Co.*, No. 06-9276 (G)(11), Civil District Court for the Parish of Orleans, State of Louisiana 259a

K. July 26, 2007 Judgment, *White III, L.L.C. v. Travelers Property Casualty Co. of America*, No. 06-9607 (G)(11), Civil District Court for the Parish of Orleans, State of Louisiana 261a

L. July 26, 2007 Judgment, *Stella White v. Louisiana Citizens Property Ins. Corp.*, No. 06-7975 (K)(5), Civil District Court for the Parish of Orleans, State of Louisiana 263a

TABLE OF AUTHORITIES—Continued

CASES Page

M. August 9, 2007 Order, *Joseph Sher v. Lafayette Ins. Co.*, No. 2007-CA-0757, Louisiana Fourth Circuit Court of Appeal 265a

N. *OneBeacon Ins. Co. v. Don's Building Supply, Inc.*, 496 F.3d 361 (5th Cir. 2007) 267a

O. *Sher v. Lafayette Insurance Co.*, No. 2007-CA-0757 (La. App. 4th Cir. Nov. 20, 2007) 279a

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals is reported at 495 F.3d 191 (5th Cir. 2007) and is reprinted in the Appendix to the Petition ("Pet. App.") 107a. The Fifth Circuit's opinion denying rehearing and rehearing en banc is reprinted at Pet. App. 169a. The District Court's opinion is reported at 466 F. Supp. 2d 729 (E.D. La. 2006) and is reprinted at Pet. App. 1a.

JURISDICTION

The Court of Appeals denied rehearing en banc on August 27, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Rule XII of the Louisiana Supreme Court provides:

> When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions of propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rending a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it.

LA. SUP. CT. R. XII(1).

STATEMENT OF THE CASE

The issue for consideration by this Court is whether the United States Court of Appeals for the Fifth Circuit disregarded principles of federalism by refusing to certify an issue of state law to a state's highest court when it was fully aware that cases involving the same exact issue were pending in state courts, there was no state appellate opinion on point, and the issue on appeal was of important concern to the State of Louisiana and its citizens. Subsequent to the Fifth Circuit's ruling in this matter, the Louisiana Fourth Circuit Court of Appeal for the Fourth Circuit has decided the exact same issue and has disagreed with the Fifth Circuit's reasoning and expressly held that the purported "flood" exclusion is ambiguous as a matter of Louisiana law.[1] The Fourth Circuit, the first Louisiana appellate court to reach this issue, held:

> As such, after a *de novo* review, we make the legal determination that the Policy with Lafayette is ambiguous as it relates to the water exclusion because it is unclear what types of floods are excluded. Therefore, strictly construed against Lafayette, Mr. Sher is covered for the damage to the basement level of the Building.

Pet. App. at 289a.

Moreover, before this ruling, every state district court to consider the issue has reached a result contrary to the holding handed down by the Fifth Circuit.[2] In fact, to the best of Xavier's knowledge, no

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[1] *See Sher v. Lafayette Ins. Co.*, No. 2007-CA-0757 (La. App. 4th Cir. Nov. 19, 2007), attached at Pet. App. 279a-337a.

[2] *See* December 5, 2006 Judgement and Reasons for Judgment, *Historic Restoration, Inc. v. RSUI Indemnity Co.*, No.

Louisiana state court has held that the term "flood" is unambiguous and would exclude from coverage damages similar to those sustained by Xavier.

As a result of these state court rulings, the Court of Appeals' refusal to certify the sole issue of state law before it to the Louisiana Supreme Court has set the stage for inconsistent decisions and confusion among the citizens of Louisiana, rather than allowing for a uniform interpretation of the insurance policies at issue in this case. Its refusal to certify has also led to a disparity in treatment of how a federal court considers issues of state law regarding insurance policies, as the Fifth Circuit has on several past occasions found certification of insurance policy interpretation appropriate to the Texas Supreme Court.

Further, the Court of Appeals' refusal to certify was made in contravention of this Court's precedent and the Fifth Circuit's own jurisprudence and conflicts with the jurisprudence of the other circuit courts of appeals. The Fifth Circuit has repeatedly certified issues of insurance policy interpretation to the Texas Supreme Court, but, for inexplicable reasons, held that, in the present case, certification of

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06-4990 (D)(16), Civil District Court for the Parish of Orleans, State of Louisiana (attached at Pet. App. 238a-258a); February 9, 2007 Judgment, *Joseph Sher v. Lafayette Ins. Co.*, No. 06-9276 (G)(11), Civil District Court for the Parish of Orleans, State of Louisiana (attached at Pet. App. 259a-260a); July 26, 2007 Judgment, *White III, L.L.C. v. Travelers Property Casualty Co. of America*, No. 06-9607 (G)(11), Civil District Court for the Parish of Orleans, State of Louisiana (attached at Pet. App. 261-262a); July 26, 2007 Judgment, *Stella White v. Louisiana Citizens Property Ins. Corp.*, No. 06-7975 (K)(5), Civil District Court for the Parish of Orleans, State of Louisiana (attached at Pet. App. 263a-264a)

an insurance policy issue was unnecessary because the guidelines for interpretation of a policy in Louisiana were clear despite the fact that the Louisiana Supreme Court had not decided the issue. As will be set forth below, the same panel of the Fifth Circuit certified an issue of insurance policy interpretation to the Texas Supreme Court within a month of issuing its opinion in the present case. Such inconsistent and disparate treatment of issues is at odds with the principles of federalism and the search for an efficient and definitive adjudication of this case and the many others like it.

For the reasons set forth herein, this Court should grant this Petition for Writ of Certiorari and direct the Court of Appeals to certify the matter before it to the Louisiana Supreme Court.

I. Facts and Procedural History

Petitioner Xavier University of Louisiana ("Xavier") is a New Orleans University that was founded in 1915, through the efforts of St. Katharine Drexel and the Sisters of the Blessed Sacrament, who established the school from which Xavier evolved. As the nation's only institution of higher learning that is historically Black and Catholic, Xavier's purpose from its founding has been to help create a more just and humane society.

On August 29, 2005, Xavier's campus sustained serious damage as a result of Hurricane Katrina's strong winds. The buildings were further damaged when the walls and levees containing two man-made drainage canals failed resulting in a spread of ground water that eventually inundated Xavier's campus.

Before Katrina, Xavier procured from Travelers an all risks property insurance policy ("the Policy"), which provided "all risks" coverage "for direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss." To repair its property and prepare its campus to re-open in January 2006, Xavier made demand on Travelers to fulfill its obligations under the Policy. Travelers, however, failed to adjust the claim in a timely manner, and Xavier filed its Complaint in the United States District Court for the Eastern District of Louisiana on February 2, 2006, because Travelers had not made **any** payments to Xavier under the Policy. In its Answer, Travelers raised as an affirmative defense the following policy language that it contends excludes coverage for part of Xavier's losses:

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that has contributed concurrently or in sequence to the loss.
>
> . . .
>
> g. Water
>
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not.

Thereafter, Xavier moved for partial summary judgment regarding the enforceability of the "water damage" exclusion. Specifically, Xavier contended that the exclusion applied only to naturally caused events and that the damage following the levee breaches around New Orleans after Hurricane Katrina was not a natural event, but, rather, the

result of the negligence of the United States Army Corps of Engineers and others.

The District Court consolidated Xavier's case with other similarly situated cases challenging the insurer defendants' use of the "water damage" exclusion to deny coverage for damages resulting from levee breaches. On November 27, 2006, the District Court granted, in part, Xavier's motion for partial summary judgment. *See* Pet. App. at 75a. The District Court held that the purported "flood" exclusion was ambiguous and concluded that the term "flood" was susceptible of multiple meanings and did not plainly distinguish between naturally caused events and man-made events. *Id.* at 74a. The District Court also noted that Travelers had written its earth movement exclusion in such a manner to explicitly exclude earth movements arising from both man-made causes and naturally caused events. *Id.* Concluding that Travelers could have written a narrower water damage exclusion in the same manner as earth movement the District Court held that the term "flood" was ambiguous and limited only to naturally caused events. *Id.*

The District Court then certified its order for interlocutory appeal to the United States Fifth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b). *Id.* at 106a. It also made the following statement with regard to further review of its rulings:

> The Court notes that if it had the power under Rule XII of the Rules of the Louisiana Supreme Court to certify the issues decided herein to that court, it would have done so, *since there are no clear controlling precedents of the Louisiana Supreme Court on same and the issues presented*

> *and decided herein are significant and require an application of Louisiana law.*

Id. (emphasis added).

Travelers filed an application for the Fifth Circuit to consider the interlocutory appeal, and the Fifth Circuit accepted the certification from the District Court. Xavier moved the Fifth Circuit to certify the questions presented to the Louisiana Supreme Court on the grounds that the only issue before the Court was the application of Louisiana law and that the Louisiana Supreme Court should provide a unified answer to the question of the proper interpretation of the "water damage" exclusion. *See id.* at 172a-178a.

The Fifth Circuit deferred ruling on the motion to certify, and considered that motion along with the merits of the appeal. On August 2, 2007, the Fifth Circuit reversed the District Court's November 27, 2006 Order and Reasons as it pertained to Xavier. *See id.* at 107a-168a. In so doing, the Court of Appeals denied Xavier's motion to certify and interpreted the Travelers Policy to preclude coverage for Xavier's ground water inundation. *See id.* at 109a-110a. The Court of Appeals concluded that the term "flood" was not ambiguous and excluded any ground water inundation, whether naturally caused or resulting from man-made acts. *Id.*

As to the issue of certification, the Fifth Circuit concluded that certification was not warranted because the rules of insurance policy interpretation set forth in the Louisiana Civil Code afforded an "adequate basis" for the Court of Appeals to decide the issues presented. *Id.* at 136a & n.11. The Court of Appeals concluded that the fact that the Louisiana Supreme Court had not issued a ruling on the flood

exclusion was not, by itself, a sufficient basis for certification. *Id.*

Xavier petitioned the Court of Appeals for rehearing en banc and re-urged its request to certify the issues on appeal to the Louisiana Supreme Court. *Id.* at 188a-217a. Xavier further advised the Court that Louisiana state appellate courts were also considering the proper interpretation of the "water damage" exclusion. *Id.* at 207a. Indeed, the Fifth Circuit was made aware that, in *Joseph Sher v. Lafayette Ins. Co.*, No. 2007-CA-0757, a five-judge panel of the Louisiana Fourth Circuit Court of Appeal had scheduled—and did hear—oral argument on September 12, 2007 regarding the proper interpretation of the purported "flood" exclusion. *See* Pet. App. at 207a & 265a.[3] On August 27, 2007, the Court of Appeals denied the petition for rehearing without comment. *See id.* at 169-171a.

REASONS FOR GRANTING THE PETITION

Without question, the issues raised in this Petition are of vital importance to the City of New Orleans, the State of Louisiana, and, indeed, the entire country. Hurricane Katrina and its aftermath were disasters of unprecedented proportion. More than 80% of the residents of the Greater New Orleans Area experienced some form of ground water inundation in their residences and businesses. When their insurers failed to honor their commitments to cover such damages, these citizens turned to the

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[3]As noted below, the *Sher* Court issued its opinion on November 19, 2007 affirming the District Court's holding that the "flood" exclusion was ambiguous under Louisiana law.

state and federal courts to resolve the disputes with their insurers.

The Court of Appeals, which was urged by the District Court and the insureds to certify the matter to the Louisiana Supreme Court, was presented with a perfect opportunity for the answers to these questions to be resolved definitively and in the most efficient manner possible. The Court of Appeals was well aware that every Louisiana state court to have considered this issue had reached a decision contrary to its own conclusion, yet it still determined that certification was inappropriate. Despite its own precedent involving similar issues of insurance policy interpretation in the absence of any guidance from a state's highest court, it failed to refer the matter to the Louisiana Supreme Court, the one tribunal all parties agree will have the final say on this issue.

Xavier asks this Court to decide whether a federal court, sitting in diversity, should make an *Erie*-guess regarding an important and undetermined issue of state law when the identical issue is being considered in state court, which has never rendered any previous decision on the issue involved, and the issue is one of great importance to the state and its citizens. The Louisiana Supreme Court, like other states' highest courts, has provided that, in such instances, a federal court may certify an issue to the state court for determination of Louisiana law.

Rule XII of the Louisiana Supreme Court provides:

> When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it ***questions of propositions of law of this state which are determinative***

> ***of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state***, such federal court before rending a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it.

LA. SUP. CT. R. XII(1) (emphasis added).

The Fifth Circuit erred in rushing to decision and ignored that the state courts will have the final say in the interpretation of Louisiana law. The Fifth Circuit disregarded principles of federalism and failed to give due consideration to the state court's handling of the issues involved in this case. In so doing, the Fifth Circuit disregarded its own precedent and the precedent of this Court to make what is admittedly a "guess" as to how the Louisiana Supreme Court would rule on this issue. The failure to certify is also at odds with decisions by other circuit courts of appeals, which have certified issues of insurance policy interpretation to a state's highest court. For these reasons, Xavier submits a strong federal question has been presented, and this Court should grant this Petition.

I. THIS COURT HAS LONG RECOGNIZED THE BENEFITS TO CERTIFYING IMPOR-TANT ISSUES OF STATE LAW TO A STATE'S HIGHEST COURT.

It is undeniable that certification procedures exist to relieve federal courts of the need of having to make an "Erie guess" about issues of state law that are important and wide ranging. On several occasions, this Court has recognized the importance of taking advantage of certification procedures as a unique tool in a federal system. In *Elkins v. Moreno*, 435 U.S. 647 (1978), this Court was called on to consider a constitutional challenge to a Maryland statute that purported to deny certain nonimmigrant resident aliens the status of "in state residents" for purposes of paying tuition at the University of Maryland. Critical to the Court's decision was whether Maryland law recognized that the aliens had acquired domicile in the state. *Id.* at 662. Recognizing that there was no dispositive state law concerning who could become a domiciliary of the state, this Court decided to certify the issue to the Maryland Court of Appeals for resolution. *Id.*

The Court observed that the question was certified to the state court because of its importance to the state, which would have the "highest interest" in determining whether a person was a domiciliary of that state. *Id.* at 662 n.16. Significantly, this Court observed:

> In a federal system, it is obviously desirable that ***questions of law, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by the state courts***. This may not always be

> possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it.

Id. (emphasis added).

The issue of certification was again considered by the Court in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Plaintiff brought a federal constitutional challenge to a state constitutional provision declaring English the official language of the state of Arizona. Considering the constitutional challenge, this Court observed that the state court should normally be afforded an opportunity to render the definitive construction of the provision before a federal court considers it. *See id.* at 75. In this case, the avenue for providing that construction was certification to the Arizona Supreme Court, an action the court below had found unnecessary.

This Court noted that "[c]ertification procedure, in contrast, ***allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and in creasing the assurance of gaining an authoritative response***." *Id.* at 77 (emphasis added). Further, "[t]hrough certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and help build a cooperative judicial federalism.'" *Id.* (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Further, "[t]aking advantage of certification made available by a State may 'greatly simplify' an ultimate adjudication by a

federal court." *Id.* at 79 (quoting *Bellotti v. Baird*, 428 U.S. 132, 151 (1976)).

This Court concluded by noting that the complexity of the litigation before it could have been avoided long ago had either the district court or court of appeals considered certification. *Id.* This was especially so considering the identical state law issue had been presented to the Arizona Supreme Court in another case, and resolution of that case would likely simplify the need for further adjudication in federal court. *Id.* at 79-80.

As these cases demonstrate, certification is appropriate where important issues of state law are concerned and there is no guidance on point from a state's highest court. In the present case, it is indisputable that interpretation of the "flood" exclusion is an issue of vital importance to the state of Louisiana and its citizens. The possibility of inconsistent results from the Fifth Circuit and the Louisiana Supreme Court also militates in favor of certification. As Justice Breyer noted in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005):

> [C]ertification would promote both judicial economy and fairness to the parties. After all, the Colorado Supreme Court is the ultimate authority on the meaning of Colorado law, and if in later litigation it should disagree with this Court's provisional state-law holding, our efforts will have been wasted and respondent will have been deprived of an opportunity to have her claims heard under the authoritative view of Colorado law.

Id. at 778 (Breyer, J., dissenting).

The parties to the various hurricane-related lawsuits in state and federal courts in Louisiana have an important interest in having a consistent, unified, singular, and authoritative decision providing guidance on this issue of significant importance. The facts of the present case are ideal for certification to the Louisiana Supreme Court. As that court will ultimately be called upon to make the determination of whether the so-called "flood" exclusion is ambiguous, principles of federalism and judicial efficiency require that a consistent voice consider the issue. The Fifth Circuit erred when it concluded otherwise, and Xavier requests that this Court grant this Petition to remedy the error.

II. THE FIFTH CIRCUIT'S STATED REASONING FOR DENYING CERTIFICATION IS CONTRARY TO ITS OWN PRECEDENT.

The Court of Appeals denied certification because it considered that state law provided set principles of insurance policy interpretation that needed no further clarification. In so doing, the Court of Appeals deviated from its own precedent certifying issues of insurance policy interpretation to a state's highest court. As will be discussed below, the Fifth Circuit, in finding certification necessary, discussed the importance of the issues involved and the need to have definitive and clear guidance from a state's highest court on these issues. Yet, in the present case, confronted with one of the most wide ranging issues the citizens of the state of Louisiana will ever face, the Court inexplicably concluded that certification was unnecessary.

In *Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. 2004), the Fifth Circuit considered whether the insureds' mold contamination claim was excluded under an ensuing loss provision found in their homeowners policy. *Id.* at 804. The Fifth Circuit concluded that the issue before it "implicates a question of state law important to both Texas homeowners and insurers." *Id.* at 809. Further, there was no Texas Supreme Court authority addressing this issue, and the lower Texas courts were split on the issue. *Id.*

The Fifth Circuit observed that it "could make an Erie-guess as to how the Texas Supreme Court would resolve this conflict. We think the better approach, given the significance of the issue, is to certify the question to the only court that can settle this uncertainty with finality." Id. at 811 (emphasis added). Accordingly, the court certified the question of whether the ensuing loss provision excluded coverage for the insureds' mold contamination. Id. at 811-12.

The issue before the *Fiess* court was no different than the issue Xavier presented to the Fifth Circuit in the present case. In the absence of controlling precedent from the state's highest court, the Fifth Circuit was asked to let the ultimate arbiter of such disputes–the respective supreme courts of Texas and Louisiana—determine the issue with finality. The Fifth Circuit's inconsistent treatment of similar issues cannot be countenanced. Surely, the rules of insurance policy interpretation in Texas are no less settled than they are in Louisiana. Moreover, the *Fiess* court at least had intermediate courts' interpretation of this issue from which to make an *Erie*-guess if it so chose. It determined that the

better course would be to let the Texas Supreme Court decide the issue considering its importance to insurers and insureds.

The same concerns are present in this case. Here, there was no intermediate authority for the Fifth Circuit to consult in rendering its *Erie*-guess. No Louisiana court had determined whether the term "flood" as found in a homeowners insurance policy excluded coverage for damages resulting from a levee breach, and, as noted, there is no more important issue to insureds in Louisiana at the present time.

Only a year after the *Fiess* court issued its decision granting certification, the Fifth Circuit, in nearly identical circumstances, certified another issue of insurance policy interpretation to the Texas Supreme Court. In *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 428 F.3d 193 (5th Cir. 2005), the issues before the court were whether certain allegations by a home buyer against the general contractor constitute an "accident" or "occurrence" under the contractor's comprehensive general liability insurer and whether such claims constitute "property damage" sufficient to trigger the insurer's duty to defend. *Id.* at 200-01. Again, there was no definitive ruling from the Texas Supreme Court on either issue, and the intermediate Texas state courts and federal district courts in Texas had reached differing answers. *Id.* at 196, 198. Noting the frequency with which such issues were coming before Texas courts, the Fifth Circuit concluded that certification was appropriate. *Id.* at 200.

Again, the Fifth Circuit's own decision in *Lamar Homes, Inc.* compels the conclusion that certification of the interpretation of the "flood" exclusion to the Louisiana Supreme Court is appropriate. As noted,

one issue of concern to the Fifth Circuit in *Lamar Homes, Inc.* was the frequency with which the interpretation of the liability policies was being litigated in Texas courts. Similarly, there is a tremendous volume of litigation in the state and federal courts of Louisiana following Hurricane Katrina that concern the proper interpretation of the so-called "flood" exclusion. Indeed, in the present case, the Fifth Circuit observed that the cases before it were "a handful of the more than forty currently pending cases related to Hurricane Katrina that have been consolidated for pretrial purposes in the Eastern District of Louisiana." *In re Katrina*, 495 F.3d at 196. That count does not take into account the many subsequently filed cases as well as the numerous state court cases in which the "flood" exclusion is at issue.

The scope of the Fifth Circuit's error is particularly magnified when compared to the result reached by the same panel that considered *In re Katrina* when it decided *OneBeacon Insurance Co. v. Don's Building Supply, Inc.*, 496 F.3d 361 (5th Cir. 2007).[4] The Fifth Circuit introduced its opinion as follows: "This diversity case involves important and determinative questions of Texas law as to which there is no controlling Texas Supreme Court precedent. Accordingly, we certify those unresolved questions to the Supreme Court of Texas." *Id.* at 361. The unresolved issue facing the Fifth Circuit was the proper rule for determining when property damage occurs for purposes of coverage in an occurrence-based commercial comprehensive general liability policy. *Id.* This case presented nothing more than

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[4] For ease of reference, this opinion is attached to the Appendix at Pet. App. 267a-278a.

the interpretation of an insurance policy—the same general issue presented to the same panel in *In re Katrina*. Without any qualification or explanation, the Court of Appeals rejected the request for certification in the present case while finding certification appropriate in *OneBeacon Insurance*.

These diametrically opposed results simply cannot be explained. As the foregoing discussion makes clear, the Fifth Circuit has on numerous occasions opted for certification of questions of insurance policy interpretation in the absence of any guidance from the Texas Supreme Court. Inexplicably, the Court deviated from that practice in the present case, and it erred in doing so. Principles of federalism and judicial efficiency weigh heavily in favor of certification in this case given the magnitude of the issue involved and the number of claimants and litigants who will be affected by the ultimate outcome of this case.

Xavier further submits that the fact that the lower intermediate courts in the cited cases were split is not a basis for distinguishing and supporting the Fifth Circuit's refusal to certify in the present case. Rather, Xavier avers that it is more significant that, in the present case, there was ***no*** Louisiana appellate law interpreting the "flood" exclusion, but, as noted herein, a number of trial courts have reached a result opposite that reached by the Fifth Circuit. Indeed, the court was truly making an *Erie*-guess without the benefit of **any** Louisiana appellate authority on point. When this fact is coupled with the importance of this issue to the state of Louisiana and its citizens, the Fifth Circuit's error is apparent.

III. LOUISIANA COURTS, APPLYING THE SAME PRINCIPLES OF CONTRACT LAW AS THE FIFTH CIRCUIT, HAVE RENDERED CONTRARY RESULTS CONCERNING THE AMBIGUITY OF THE PURPORTED "FLOOD" EXCLUSION.

The first Louisiana state appellate court to consider this issue, the Louisiana Fourth Circuit Court of Appeal, has very recently, and after a contrary ruling in this matter, concluded that the term "flood" as found a similar water exclusion to be ambiguous under Louisiana law. In *Sher v. Lafayette Insurance Co.*,[5] the plaintiff's insurance policy contained a nearly identical exclusion for damages caused by "flood" as found in the Travelers all risks policy issued to Xavier in the present case. The District Court held that the term was ambiguous and excluded from coverage only naturally caused floods. Applying Louisiana law, on November 19, 2007, the Fourth Circuit concluded that the term "flood" was ambiguous as it was susceptible of different meanings and, as a result, had to be interpreted against Lafayette, which issued the policy. Pet. App. at 289a.

In reaching this decision, the Fourth Circuit applied the same principles of Louisiana contract and insurance law that the Fifth Circuit had previously found provided a "adequate basis" to make an "*Erie*-guess" about the same question of Louisiana law, yet it reached the opposite result. Specifically, the court set out to determine the parties' common intent in an

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[5] No. 2007-CA-0757 (La. App. Nov. 19, 2007), attached at Pet. App. 279a-339a.

insurance contract. *Id.* at 288a. The court noted that the intent was to provide coverage and should be construed in such a manner as to effect this objective. *Id.* The court further noted that the parties intended to cover all risks except those explicitly excluded. *Id.* As the term "flood" was susceptible of multiple meanings, the court held that Lafayette had failed to exclude all types of flood from coverage. *Id.*

The Fourth Circuit concluded:

> As such, after a *de novo* review, we make the legal determination that the Policy with Lafayette is ambiguous as it relates to the water exclusion because it is unclear what types of floods are excluded. Therefore, strictly construed against Lafayette, Mr. Sher is covered for the damage to the basement level of the Building.

Id. at 289a.

Further, before the decision in *Sher* was rendered, several state courts have reached the same result as the District Court and have held that the term "flood" is ambiguous and should be construed to exclude coverage only for naturally occurring water inundation. In a number of cases, several different judges of the Civil District Court for the Parish of Orleans have concluded that the term "flood" is ambiguous.[6] Xavier is aware of no state court case in which a contrary result has been reached.

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[6] *See* December 5, 2006 Judgement and Reasons for Judgment, *Historic Restoration, Inc. v. RSUI Indemnity Co.*, No. 06-4990 (D)(16), Civil District Court for the Parish of Orleans, State of Louisiana (attached at Pet. App. 238a-258a); February 9, 2007 Judgment, *Joseph Sher v. Lafayette Ins. Co.*, No. 06-9276 (G)(11), Civil District Court for the Parish of Orleans, State of Louisiana (attached at Pet. App. 259a-260a); July 26,

As a result of the Fourth Circuit's ruling in *Sher*, Louisiana's citizens and courts are confronted with a situation in which two appellate courts have reached contrary conclusions on the same issue. This confusion and inefficient result was entirely avoidable had the Fifth Circuit followed the recommendation of the District Court and the requests of the insureds, such as Xavier, and certified the question of interpretation of the "flood" exclusion to the Louisiana Supreme Court. Such legal confusion is not an efficient administration of justice and leads to uncertainty and potentially inequitable treatment of insureds depending only on the forum in which their suit is pending. The appropriate resolution to these outstanding legal questions is for one voice–that of the Louisiana Supreme Court–to fully and ultimately resolve the issue.

2007 Judgment, *White III, L.L.C. v. Travelers Property Casualty Co. of America*, No. 06-9607 (G)(11), Civil District Court for the Parish of Orleans, State of Louisiana (attached at Pet. App. 261-262a); July 26, 2007 Judgment, *Stella White v. Louisiana Citizens Property Ins. Corp.*, No. 06-7975 (K)(5), Civil District Court for the Parish of Orleans, State of Louisiana (attached at Pet. App. 263a-264a).

IV. THE FIFTH CIRCUIT'S REFUSAL TO CERTIFY THE ISSUE ON APPEAL TO THE LOUISIANA SUPREME COURT IS IN CONFLICT WITH DECISIONS BY OTHER CIRCUIT COURTS OF APPEALS THAT HAVE CERTIFIED ISSUES OF INSURANCE POLICY INTERPRETATION TO A STATE'S HIGHEST COURT.

The Fifth Circuit's decision in the present case not to certify the issue of interpretation of an insurance policy in the absence of any guidance of Louisiana appellate courts is at odds with the results reached in similar circumstances by other federal appellate courts. In *United States Fidelity & Guaranty Co. v. Park 'n Go of Georgia, Inc.*, 66 F.3d 273 (11th Cir. 1995), the Eleventh Circuit Court of Appeals was confronted with a dispute concerning coverage for cars that were parked at the insured's airport parking facility. The insurer denied coverage citing an exclusion for cars in the insured's care, custody, or control. The Eleventh Circuit noted that resolution of the issue turned on issues of Georgia law, particularly the meaning of the terms "care, custody, or control." Without any resolution from the Georgia Supreme Court, the Eleventh Circuit certified the issue to that entity for ultimate disposition of the coverage dispute. *See id.* at 278-279.

The Eleventh Circuit again certified an issue of insurance policy interpretation in *York Insurance Co. v. Williams Seafood of Albany, Inc.*, 223 F.3d 1253 (11th Cir. 2000). In *York Insurance*, the issue was whether a "flood" exclusion trumped a policy's provision covering sinkhole collapse. *Id.* at 1254. The court noted that the matter was governed by

general principles of state law interpretation of insurance policies and contracts, but, in the absence of any controlling state law to resolve the interplay of the two policy provisions, the matter would be certified to the Georgia Supreme Court. *Id.* at 1256.

Further, in *City of Burlington v. Indemnity Insurance Company of North America*, 332 F.3d 38 (2nd Cir. 2003), the Second Circuit Court of Appeals had to determine whether, under Vermont law, an "all risk" insurance policy covered externally caused losses and, if not, whether an exclusion for damages caused by latent defects applied to failed welds on a power generator's boiler. *See id.* at 40. The Second Circuit concluded that because the state courts "have not yet ruled on the issues presented by this case and because these issues involve important public policy considerations for Vermont, we certify our question to the Vermont Supreme Court, and ask for its guidance." *Id.* at 40-41. While the court later offered its interpretation of the issues presented, it nonetheless found certification appropriate noting that its conclusions involved "significant assumptions" about Vermont law that would "implicate important policy considerations, the determination of which lies within the province of Vermont and its courts"; thus, it was deemed prudent to certify the issue to the Vermont Supreme Court.

Thus, this Court and the Circuit Courts of Appeal have uniformly concluded that certification of state law issues is warranted in the absence of any guidance from a state's highest court and where the issue is one of important public concern. On numerous occasions, courts have determined that certification was appropriate to allow a state's highest court to resolve unsettled issues of insurance

policy interpretation. Indeed, the Fifth Circuit has reached this conclusion in several cases decided before and after its decision in the present case. The bases for which certification was refused in the present case cannot be well taken considering its willingness to certify insurance issues in other cases.

The issue presented by the present case—whether a purported "flood" exclusion is applicable to man-made events as well as naturally occurring events–falls within both of these standards. There is no guidance from the Louisiana Supreme Court—or any intermediate state appellate court—on the issue presented, and the matter is a vital state interest. Rather than making an *Erie*-guess, the Fifth Circuit should have certified the matter to the Louisiana Supreme Court to allow for a definitive, conclusive, and final resolution this issue. In failing to do so, the Court of Appeals overlooked the precedent and guidance of this Court, its own precedents, and the persuasive authority of other circuit courts of appeals. Xavier requests, therefore, that this Court vacate the judgment of the Fifth Circuit in the present case and remand the matter with instructions to certify the issue on appeal to the Louisiana Supreme Court. Alternatively, Xavier requests that this Court vacate the Fifth Circuit's judgment and directly certify the issue on appeal to the Louisiana Supreme Court.

CONCLUSION

For the foregoing reasons, Xavier respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari.

Respectfully Submitted,

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November 2007

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 05-4182
SECTION "K"(2)

IN RE: KATRINA CANAL BREACHES CONSOLIDATED LITIGATION PERTAINS TO INSURANCE *Vanderbrook,* C.A. No. 05-6323 *Xavier University,* C.A. No. 06-516 *Chehardy,* C.A. No. 06-1672, 06-1673, and 06-1674

and

CIVIL ACTION
NO. 06-0169
SECTION K(2)

KELLY A. HUMPHREYS,

versus

ENCOMPASS INSURANCE COMPANY, *et al.*

ORDER

On September 19, 2006, *Berthelot, at al. v. Boh Bros. Construction, et al.,* C.A. No. 05-4182 was filed in the Eastern District of Louisiana. This case began the stream of complaints that have been flied as a result of damages arising out of all levee breaches which occurred in the aftermath of Hurricane Katrina.

Berthelot was transferred to the undersigned on February 23, 2006. (Doc. 47). It was subsequently determined by the *en banc* court of the Eastern District of Louisiana that in order to avoid conflicting decisions among the various sections of the Court, the proper approach would be to consolidate all such filings for purposes of pretrial discovery and motion practice. As such, what is now captioned *"In re: Katrina Canal Breaches Consolidated Litigation,"* C.A. No. 05-4182, has become the umbrella for all cases which concern damages caused by flooding as a result of breaches or overtopping in the areas of the 17th Street Canal, the London Avenue Canal, the Industrial Canal, and the Mississippi Gulf River Outlet ("MRGO").

The following Orders and Reasons[1] are being entered in four individual cases which are part of the umbrella and all of which have as their centerpiece the issue of insurance coverage. Theses cases are:

Vanderbrook et al. v. State Farr; Fire & Cas, Co., at al. C.A. No. 05-6323;

Xavier University of Louisiana v. Travelers Property Ca. Co. of America, C.A. No. 06-516;

Chehardy, et Cal. V. State Farm, et al., CA. No. 06-1672, 06-1673, and 06-1674; and

Humphreys v. Encompass Ins. Co., C. A. No. 06-169.[2]

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[1] The document numbers referred to herein are those as entered in the Consolidated Matter unless otherwise noted; once a case is consolidated in the umbrella, any document filed is entered sequentially, regardless of the case to which it pertains.

[2] *Humphreys* was initially consolidated but at the request of the litigants it was terminated from the umbrella; however, in

Oral argument was conducted with respect to *Vanderbrook* on August 25, 2006, and with respect to *Xavier, Chehardy and Humphreys* on October 27, 2006. Based on the pleadings, memoranda, exhibits, arguments and the relevant law, the Court is prepared to rule on all the motions pending in all four cases.

IT IS ORDERED that this document shall be entered onto the docket of the *In re Katrina Canal Breaches Consolidated Litigation*, C.A. No. 05-4182 referencing all three of the cases noted above and *Humphreys* separately. The Court will begin with the *Vanderbrook* matter.

* * * *

THIS ORDER PERTAINS SPECIFICALLY TO:

Vanderbrook et al, v. State Farm Fire & Cas, Co., et al. C.A. No. 05-6323;

ORDER AND REASONS

Before the Court are the following motions filed in this matter:

Doc. No. 568 Motion for Judgment on the Pleadings filed by Hanover Ins. Co. ("Hanover") insurer of plaintiff' James Capella and Madeline Grenier;[3]

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light of the inter-related nature of this case, the Court will include this case in this consolidated opinion.

[3] At oral argument on these motions, Hanover orally moved to include in its motion the claims of Madeline Grenier who had been misidentified as Sophia Granter as the insured. This motion was orally granted. Thus, the docket sheet as to this motion does not include her as the subject of the motion; however, the docket sheet should be so amended to reflect that the plaintiff Sophia Granier is actually Madeline Grenier and IT

Doc. No. 569 Motion for Judgment on the Pleadings filed by Standard Fire Ins. Co. ("Standard") insurer of plaintiffs Peter Anthony Ascani, III, Gregory R. Jackson, and Monica Reyes;

Doc. No. 570 Motion for Judgment on the Pleadings filed by State Farm Fire & Cas. Co. ("State Farm") insurer of Mary Jane Silva and Robert G. Harvey;

Doc. No. 572 Motion to Dismiss Party filed by Hartford Ins. Co. of the Midwest ("Hartford") insurer of Jack Capella as the Executor of the Succession of Lillian Capella;

Doc. No. 598 Motion for Judgment on the Pleadings filed by Unitrim Preferred Ins. Co. ("Unitrim) insurer of Richard Vanderbrook.

These motions were brought in response to the class action suit brought by the "Vanderbrook" plaintiffs.

The instant petition was initially filed in Civil District Court for the Parish of Orleans on October 14, 2005. Plaintiffs filed suit seeking coverage for damages caused by the collapse of the 17th St. Canal

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IS SO ORDERED. At the time of the hearing, the relevant policy of insurance was introduced and filed into the record.

Additionally, certain of the Defendants are improperly named. The Standard Fire Insurance Company ("Standard Fire") is improperly named as Travelers Insurance Company and St. Paul Travelers Insurance Company. Hartford Insurance Company of the Midwest ("Hartford") is improperly named as Hartford Insurance Company. Unitrin Preferred Insurance Company ("Unitrin") is improperly named *as* Kemper Insurance Company.

floodwall and the ensuing water damage as well as claims against the Board of Commissioners for the Orleans Levee District ("OLD") for its alleged negligence. Defendants removed the case to this Court on December 2, 2005. On June 1, 2006, the Court severed the claims brought against OLD from those filed against the insurers and finding no basis for jurisdiction over OLD, remanded those claims to Civil District Court. The Court retained diversity jurisdiction over the remaining insurers.

Five different policies of insurance are involved in this case—all Homeowners/All Risk policies. Oral argument was conducted on August 25, 2006, and supplemental briefing ordered thereafter. Having reviewed the complaint, memoranda, exhibits, briefing, and the relevant law, the Court is now prepared to deliver its opinion.

It cannot be gainsaid that in approaching these motions, which are the first in a daunting line of litigation concerning insurance coverage for the losses caused by the canal breaches in New Orleans, the potential impact of such a decision on individuals as well as the insurance industry might be considered overwhelming. However, the Court believes that it is its duty to approach its analysis in a straightforward, judicious manner—that is analyzing the contractual disputes between an individual policy holder and the relevant insurer, sitting as an *Erie* court, using the civilian approach of a Louisiana court, applying the Louisiana Civil Code and seeking guidance from the jurisprudence of the state.

C. Civilian Approach as an *Erie* Court

This Court will apply Louisiana law in an attempt to rule as a Louisiana court would if presented with

the same issues. *Musser Davis Land Co. v. Union Pacific Resources*, 201 F.3d 561, 565 (5th Cir.2000), *citing Erie R. Co, v. Tompkins*, 304 U.S. 64, 79-80, 58 S,Ct. 817, 82 L.Ed. 1188 (1938); M*ozeke v. Intl Paper Co.*, 856 F.2d 722, 724 (5th Cir.1988). As stated in *Musser:*

> To determine a state law question, we first look to decisions of the Louisiana Supreme Court. *See Transcontinental Gas v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir.1992) If the Louisiana Supreme Court has not spoken on the issue, it is our duty to determine as best we can what that court would decide. *See id.; Hulin v. Fibreboard Corp.*, 178 F.3d 316, 318-19 (5th Cir. 1999),
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> Under Louisiana's Civil Law tradition, courts look first and foremost to statutory law, The Louisiana Civil Code instructs that "[sources of law are legislation and custom,]" and that "[I]legislation is a solemn expression of legislative will." "[T]he primary basis of law for a civilian is legislation, and not (as in the common law) a great body of tradition in the form of prior decisions of the courts." The concept of *stare decisis* is foreign to the Civil Law, including Louisiana. Therefore, in cases such as this we are guided by decisions rendered by the Louisiana appellate courts, particularly when numerous decisions are in accord on a given issue-the so-called *jurisprudence constant-but* we are not strictly bound by them.

Transcontinental Gas Pipe Line Corp. v. Transportation Ins, Co., 953 F.2d 985, 988 (5th Cir. 1992) (footnotes omitted). Thus, the Louisiana Civil Code provides the primary source and framework by which this Court must review the these contracts. With this

in mind, the Court will first examine the allegations made by the plaintiffs.

C. The Petition and Issue Presented

Plaintiffs each own a home in New Orleans which is insured by one o f the defendants and which suffered substantial water damage at the time of Hurricane Katrina. (Petition, ¶ 7.) They allege that "[s]ometime between 10:00 and 11:00 a.m. on August 29, 2005, before the full force of [Hurricane Katrina] reached the City of New Orleans, a small section of the concrete outfall canal wall known as the 17th Street Canal, suddenly broke, causing water to enter the streets of the City of New Orleans and homes of Petitioners," which damaged Plaintiffs' homes. (*Id.*, 1 3.) Plaintiffs contend that "said water damage inflicted on the Petitioners' homes and property was *not* the result of flood, surface water, waves, title [sic] water, tsunami, seiche, overflow of a body of water, seepage under or over the outfall canal wall or spray from any of the above but was water intrusion, caused simply from a broken levee wall." (*Id.*, ¶ 4 (emphasis added).) Plaintiffs claim that defendants improperly failed to pay for the water damage to their homes because it is not an excluded loss. (*Id.* ¶ 10.) Plaintiffs also contend that the water damage exclusions in the policies are unconscionable and void. (*Id.*, ¶ 11.)

Plaintiff further allege, separately, that the Levee Board "breached their duty to Petitioners by failing to correct the break in the canal wall] or warn others including Petitioners of the impending water intrusion . . ." (*Id.* ¶ 6.) As noted, these allegations have been severed and remanded to state court.

Plaintiffs contend that because Louisiana employs the "efficient proximate cause doctrine" with respect to coverage and because the third-party negligence of Orleans Levee District is the efficient, proximate cause of the subsequent flooding of plaintiffs' homes, their Homeowners Policies should provide coverage. The defendants maintain that under the clear, unambiguous terms of the policies at issue, they are entitled to judgment as a matter of law.

C. Standard for Judgment on the Pleadings

When a defendant attacks the complaint because it fails to state a legally cognizable claim, Rule 12(b)(6) provides the appropriate challenge. The test for determining the sufficiency of a complaint under Rule 12(b)(6) is that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id. citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Fifth Circuit explained;

> Subsumed within the rigorous standard of the *Conley* test is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Pouters*, 867 F.2d 877, 880 (5th Cir. 1989). Further, "the plaintiffs complaint is to be construed in a light most favorable to plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Securities, Inc.* 94 F.3d 189, 194 (5th Cir. 1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt*, 561 F.2d at 608. In other words, a motion to dismiss an action for

> failure to state a claim" admits the facts alleged in the complaint, but challenges plaintiffs rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Intl, Inc.*, 975 F.2d 1134, 1137 (51h Cir. 1992). Finally, when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court must examine the complaint to determine whether the allegations provide relief on any possible theory. *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir, 1994).

Id. at 161-62. Bearing this standard in mind, the court will examine the civilian rules of construction to aid it in its determination of the viability of defendants' motions.

IV. Legal Concepts for Contract Interpretation

C. Insurance Policy is a Contract and Rules of Construction

"An insurance policy is a conventional obligation that constitutes the law between the insured and insurer, and the agreement governs the nature of their relationship." La. Civ. Code art. 1983; *Edwards v. Daugherty*, 883 So.2d 932, 940 (La. 2004); *Peterson v. Schimek*, 729 So.2d 1024, 1028 (La. 1999). As such, the general rules of contract interpretation as set forth in the Louisiana Civil Code guide the Court in interpreting the subject insurance policies. *Peterson*, 729 So.2d at 1028. "The judiciary's role in interpreting insurance contracts is to ascertain the common intent of the parties to the contract. *See* La. Civ. Code art. 2045; *Carbon* [*v. Allstate Ins, Co.*, 97-3085, p. 4 (La. 10/20/98, 719 So. 2d 437, 439]; *Louisiana Ins.* [*Guar. Ass'n v. Interstate Fire & Cas. Co.* 03-0911, p. 5 (La. 1/14/94)], 630 So.2d 759, 763." *Cad-*

wallader v. Allstate Ins. Co., 848 So.2d 577 (La. 2003).

In *Cadwallader*, the Supreme Court of the State of Louisiana set forth succinctly the most important guiding principles:

> Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. *See* La. Civ Code art. 2047; *Peterson v. Schimek*, 98-1712, g. 5 (La.3/2/99), 729 So.2d 1024, 1028-29; *Carbon*, 7 19 So.2d at 440441; *Reynolds*, 634 So.2d at 1183. An insurance contract, however, should not be interpreted in an unreasonable or strained manner under the guise of contractual interpretation to enlarge or to restrict its provisions beyond what is reasonably contemplated by unambiguous terms or achieve an absurd conclusion. *Carrier v. Reliance Ins. Co.*, 99-2573, p. 11 (La.4/11/00), 759 So.2d 37, 43; *Peterson*, 729 So.2d at 1029. The rules of construction do not authorize a perversion of the words or the exercise of inventive powers to create an ambiguity where none exists or the making of a new contract when the terms express with sufficient clearness the parties' intent. *Succession of Fannaly v. Lafayette Ins. Co.*, 01-1355, p. 4 (La.1/15/02), 805 So.2d 1134, 1138; *Peterson,* 729 So.2d at 1029.
>
> . . .
>
> If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written. *Fannaly*, 805 So2d at 1137; *Louisiana Ins.*, 630

> So.2d at 764. Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation when the policy's provisions are couched in unambiguous terms. *Peterson*, 729 So.2d at 1029; *Louisiana Ins.*, 630 So.2d at 764. The determination of whether a contract is clear or ambiguous is a question of law. *Louisiana Ins.*, 630 So.2d at 764.

Cadwallader, 848 So.2d at 580 (coverage provided by UM policy for resident relative in household did not include foster children). In addition, an insurance contract 9s construed as a whole and each provision in the policy must be interpreted in light of the other provisions so that each is given meaning. One portion of the policy should not be construed separately at the expense of disregarding other provisions." La. Civ. Code art. 2050. *Peterson*, 729 So.2d at 1029.

B. All-risks Liability Insurance: Coverage, Exclusions and Ambiguities

A Homeowners Policy is considered a type of "all-risks" insurance." All-risks insurance is a special type of insurance extending to risks not usually contemplated, and generally allows recovery for all fortuitous losses, unless the policy contains a specific exclusion expressly excluding the loss from coverage." Jane Massey Draper, "Coverage Under All-Risk Insurance", 30 A.L.R.5th 170. The United States Court of Appeals for the Fifth Circuit acknowledged this concept stating, "[a] policy of insurance insuring against 'all risks' creates a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from

coverage." *Alton Ochsner Medical Foundation v. Allendale Mut. Ins.*, 219 F.3d 501, 504 (5th Cir. 2000), *citing US Indus., Inc. v. Aetna Cas. & Sur. Co.*, 690 F.2d 459, 461 (5th Cir.1982) (construing Louisiana law and citing *Dow Chem. Co. v. Royal Indem. Co.*, 635 F.2d 379, 387 (5th Cir.1981) (construing Texas law)).

Thus, in the context of the instant motions, under Louisiana law, unless there is a specific exclusion for the type of water damage that an insured has incurred, coverage is presumed under these policies. The focus of a court's inquiry then is on the relevant exclusions to coverage. "When determining whether or not a policy affords coverage for an incident, it is the burden of the insured to prove the incident falls within the policy's terms. . . On the other hand, the insurer bears the burden of proving the applicability of an exclusionary clause within a policy." *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 124 (La. 2000).

With respect to the proper approach concerning the interpretation of an exclusion, they are generally strictly construed. *Bezue v. Hartford Accident and Indem. Co.*, 224 So.2d 76, 77 (La. App. 1st Cir. 1969), *Cadwallader* further amplifies this concept:

> Ambiguous policy provisions are generally construed against the insurer and in favor of coverage. La. Civ. Code art. 2056; *Carrier*, 759 So.2d at 43; *Louisiana Ins.*, 630 So.2d at 764, Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. *Carrier*, 759 So.2d at 43.

Cadwallader, 848 So.2d at 580 (emphasis added). This rule of interpretation is based on the fact that

these provisions are prepared by the insurer, and the insured had no voice in the preparation. *Louisiana Ins.*, 630 So.2d at 764. This type of contract is commonly referred to as a contract of adhesion. Article 2056 states, "In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." La. Civ, Code art. 2056; *see Louisiana Ins. Guar. Assoc.*, 630 So.2d at 764 *citing* 15 *Civil Law Treatise, Insurance Law and Practice* § 4 (1986) and W. Freedman, 2 *Richards on the Law of Insurance* § 11:2[f] (6th Ed. 1990) ("*Richards*"). "That strict construction principle applies only ifthe ambiguous policy provision is susceptible to two or more *reasonable* interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable." *Cadwallader*, 848 So. 2d at 580 *citing Carrier*, 759 So.2d at 43-44. (emphasis in original) and *Louisiana Ins. Guar. Assoc.*, 630 So.2d at 770.

The Supreme Court of Louisiana gave further instruction with respect to the interpretation of an ambiguity in *Louisiana Ins. Guar. Assoc.* stating:

> "Ambiguity will also be resolved by ascertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered." *Breland v. Schilling*, 550 So.2d 609, 610-11 (La.1989). The court should construe the policy "to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry," *Trinity Industries*, 916 F.2d at 269 (5th Cir.1990)

> (citing *Benton*, 379 So.2d at 231 and LSA-C..C. Arts. 2045, 2050, 2053 and 2054). In insurance parlance, this is labelled the reasonable expectations doctrine. *Richards, supra* at § 11:2[g].

Louisiana Ins. Guar. Assoc., 630 So.2d at 764. The Louisiana Supreme Court then noted in a footnote,

> "The reasonable expectations doctrine can be capsulized as follows: "courts will protect the [insured's] reasonable expectations . . . regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer." R. Keeton and A. Widiss, *Insurance Law* § 6.13 (1988).

Id. at n. 19. Thus, if after applying the other general rules of construction, an ambiguity remains, the ambiguous contractual provision is to be construed against the insurer who furnished the policy's text and in favor of the insured finding coverage. La. Civ. Code art. 2056. *Peterson*, 729 So. 2d at 1029. "It is the reasonable interpretation of an insured that governs the legal effect of language in an insurance contract, and not whether the language chosen by an insurer may constitute a legal term of art in another context." *Lee v, Unum Life Ins, Co. of America,* 900 So.2d 1021, 1029 (La. App. 4th Cir. 2005).

C. Exclusions and Canons of Construction

The Louisiana Supreme Court in interpreting an exclusion to coverage in the context of a company's public liability insurance stated:

> The exclusion clause must necessarily be examined and interpreted in the light of its own

> design and intent, as well as in view of the objects and purposes of the policy. Once coverage has been extended, as it is quite clearly the purpose of the policy to do and as has been done here, it should be withdrawn only when exclusion is established with certainty. And because comprehensive exclusion is violative of the purpose and intent of policy coverage, exclusion must necessarily be specific and not general. It is specific, as distinguished from comprehensive, when it particularly identifies the insured or insureds intended to be excluded. The exclusion clause, as its name implies, sets forth th traits, characteristics and circumstances that mark an insured for exclusion, And the insured or insureds to be excluded must bear the marks and traits, or conform with the circumstances, described and particularized in the exclusion clause as the basis for exclusion.'

Pullen v. Employers' Liability Assur. Corp., 89 So.2d 373, 377 (La. 1956).

Indeed, in *Anderson v. Indiana Lumbermens Mut. Ins. Co.*, 127 So.2d 304 (La. App. 2nd Cir. 1961), a Louisiana appellate court dealt with a claim made on homeowner policy where "collapse" was a covered peril and there was an exclusion which provided that the insurer would not be liable "for loss caused directly or indirectly by earthquake, or other earth movements except landslides." *Id.* at 304 (emphasis added). In the home in question, a crack had appeared in the wall of the house and since that time, the crack had become larger, extending into the ceiling of the living room and cracks had appeared in the walls, at every window and door in the house, The door frames were out of square and the

foundation was broken, cracked, fallen and uneven. It was alleged in that case that the cause of damage to the home was (1) the expansion and contraction of the soil which had caused (2) the cracking, breaking and falling of the concrete slab (3) combined with the falling cracking, breaking and unequal settlement of the building (4) thus impairing the basic structural integrity of the building. The insurer maintained that the damage to the house did not constitute a "collapse" and that even if it did, it was excluded as it was caused by "other earth movements."

The appellate court noted that there was no precedent for an interpretation of "collapse" in Louisiana and noted that there were four cases rendered outside of Louisiana where the evidence did not indicate the structure had completely fallen down or caved in finding coverage and two denying coverage based on this exclusion.

The court, after discussing the guidance provided by the Civil Code in determining the construction of the word "collapse", noted:

> LSA-Civil Code, art. 1955 providing that 'all clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act' appears to be a statement of the ejusdem generis' rule of construction, concerning which Black's Law Dictionary states:
>
> > 'In the construction of laws, wills, and other instruments, the 'ejusdem generis rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of

> the same general kind or class as those specifically mentioned. Black, Interp. of Laws, 141; *Goldsmith v. U.S., C.C.A.N.Y.*, 42 F.2d 133, 137; *Aleksich v. Industrial Accident Fund*, 116 Mont. 69 (127), 151 P.2d 1016, 1021. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.
>
> 'The maxim 'ejusdem generis', is only an illustration of the broader maxim, 'noscitur a sociis' *State v. Western Union Telegraph Co.*, 196 Ala. 570, 72 So. 99, 100:
>
> And, in defining the phrase, 'noscitur a sociis', as used in the aforesaid definition the following explanation and definition are given:
>
> > 'It is known from its associates, 1 Vent. 225. The meaning of a word is or may be known from the accompanying words. 3 Term R. 87; Broom, Max. 588. *More-cock v. Hood*, 202 N.C. 321, 162 S.E. 730, 731; *Louis Pizitz Dry Goods Co, v. Fidelity & Deposit Co. of Maryland*, 223 Ala. 385, 136 So. 800, 801.
> >
> > 'The doctrine means that general and specific words are associated with and take color from each other, restricting general words to sense analogous to less general. *Dunham v. State*, 140 Fla. 754, 192 So. 324, 325, 326.'

Anderson, 127 So.2d 306-07; *but see, Nida v. State Farm Fire & Gas, Co.*, 454 So.2d 328 (La. App. 3rd Cir. 1984) (insurance definition of "collapse" in policy at issue revised to deny coverage for losses against settling). The *Anderson* court eventually found that

the insurance at issue therein provided coverage finding that "collapse" would not be given an "abstract, narrow construction." Citing to *Jenkins v. United States Fire Ins, Co.*, 185 Kan. 665, 347 P.2d 417 (Kan. 1959), the court noted that construing on the basis of intention, it would be understood that if the settling, falling, cracking bulging or breaking of the insured building so materially impaired the basic structure, that it would be considered a "collapse." Thus, the Court in interpreting the risk insured employed the expansive definition.

The court then found that the exclusion was to be narrowly construed relying on *Pullen*. It found that "other earth movements" is entirely "too general to have application to any degree of certainty" to the causation of the "collapse" of the subject building as the cause of damage would embrace "the same general kind, class or nature of peril *as* its companion words 'earthquake' and 'landslide,'" *Anderson*. 127 So.2d at 308-09. As such, the concept of the "specific controls the general" was used to find the exclusion limited a more violent earth movement—not just the natural expansion and contraction of the soil that had allegedly caused the damage for which coverage was sought *See also, Smith v. Burton*, 928 So.2d 74, 79 (La, App. 1st Cir. 2005); *Baton Rouge Oil and Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002); *Sommers v. State Farm Fire and Cas. Co.*, 764 So.2d 87, 91 (La. App. 4th Cir. 2000) (where general terms precede specific terms, principle is the same: general terms should be construed to encompass things similar or analogous to those in the specific terms). With these precepts in mind the Court will now turn to the specific water damage exclusions at issued before the Court.

V. Insuring Language and Exclusions of the Policies at Issue

a. ISO Policies

The "ISO policies"[4] issued by Standard Fire, Hartford, Hanover and Unitrin, all contain identical language. As to the coverage provided, each policy states:

> COVERAGE A—DWELLING and COVERAGE B—OTHER STRUCTURES: We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property.

(Standard Fire Policies, App. at INS 94 and INS 134; Hartford Policy, App. at LEIS 53; Hanover Policy, App. at INS 7; Unitrin Policy, App. at INS 169.)[5] Following the coverage provision, this exclusion appears:

> (1) We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.[6]

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[4] "ISO" is an acronym for "Insurance Service Office, Inc." which provides products and services help to the insurance industry to measure, manage and reduce risk, it provides standardized insurance policy language such as the policies noted herein. *See*, ISO Homepage at www.iso.com.

[5] These citations refer to the appendix filed in conjunction with the Motion for Judgment on the Pleadings filed by Hanover Ins. Co. (Doc. No. 568) that was used as a joint exhibit containing all of the insurance policies at issue herein.

[6] This provision is generally referred to as an "anti-concurrent cause clause." Its genesis *was* the result of court decisions utilizing the "concurrent causation doctrine". Under this doc-

. . .

(c) Water Damage, meaning:

Flood, surface water, waves, tidal water, overflow of a body of water, or spray from

any of these, whether or not driven by wind;

(Standard Fire Policies, App. at INS 96 and INS 136; Hartford Policy, App. at INS 56; Hanover Policy, App. at INS 9; Unitrin Policy, App. at INS 171.) "Flood" is not defined anywhere in the policy. this exclusion will be referred to as the ISO exclusion.

b. State Farm Policy with "Lead-In" Provision

The State Farm policies note at the outset that "We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I-LOSSES NOT INSURED." They then provide:

SECTION 1—LOSSES INSURED

Coverage A—Dwelling

We insure for accidental direct physical loss to the property described in Coverage A, except as provided in Section I—LOSSES NO INSURED.

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trine, the insurer is obligated to pay for damages resulting from a combination of covered and excluded perils if the efficient proximate cause is a covered peril. To counteract these decisions, insurers began employing the anti-concurrent cause clause to exclude losses if caused in whole or in part, in any sequence of events by an excluded peril. Stephen P. Pate, *Recent Developments in Property Insurance Law*, 33 Tort & Ins. L.J. 659, 663 (1998).

SECTION 1—LOSSES NOT INSURED

2. We do not insure under any coverage for loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such lass regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:[7]

c. (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these all whether driven by wind or not;

(Doc. 570, Exhibit A and B, pp. 7 and 10).

C. Hartford Policy's specific Flood Definition

Of all of these policies, only Hartford includes an "Amendatory Endorsement Specifically Excepted Perils." (Form H-380). This two page provision provides in relevant part:

As used herein, Peril means a cause of physical loss or damage to property. It has this meaning whether or not it is called a Peril or a Cause of Loss in this policy.

Even if any of the terms of this, policy might be construed otherwise, the following Perils. as described in Paragraphs A. and B. below, are SPECIFICALLY EXCEPTED FROM THIS POLICY. WE DO NOT COVER INSURE AGAINST

[7] This subsection is known as the "lead-in" provision.

LOSS OR DAMAGE DIRECTLY OR INDIRECTLY CAUSED BY, RESULTING FROM, CONTRIBUTED TO OR AGGRAVATED BY, OR WHICH WOULD NOT HAVE OCCURRED BUT FOR, EITHER OF THESE PERILS: A. ACTS, ERRORS OR OMISSIONS

3. The design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction of all or any part of the following:

   b. Roads, water or gas mains, sewers, drainage ditches, levees, dams, or other facilities

5. The maintenance of any of such property or facilities.

This exception A. applies whether or not the property or facilities described above are:

1. Covered under this policy; or
2. On or away from the covered premises.

This exception A. does not reduce the insurance for loss or damage caused directly by a Covered Peril.

As used in this endorsement

1. if this policy is written to cover the risk of loss from specifically named causes, Covered Peril means any Peril specifically named as covered;
2. If written to cover the risk of loss without specifying specifically named causes, Covered peril means any Peril not described above and not otherwise excluded or excepted from the causes of loss covered by this policy.

B. COLLAPSE CRACKING OR SHIFTING of buildings, other structures or facilities, or their parts, if the collapse, cracking or shifting:

1. Occurs during earth movement, volcanic eruption or flood conditions or within 72 hours after they cease; and

2. Would not have occurred but for earth movement, volcanic eruption, or flood.

But if loss or damage by a Covered Peril ensues at the covered premises, we will pay for that ensuing loss or damage.

This exception B. applies whether or not there are other provisions in this policy relating to collapse, cracking or shifting of buildings, other structures or facilities, or their parts. Any such provision is revised by this endorsement to include this exception.

But if this policy specifically covers (by endorsement or in any other way) loss or damage caused by one or more of the following Perils:

2. Flood:

this exception B. will not reduce that coverage.

As used in this exception B:

6. flood means:

a. Flood, surface water, waves, tides, tidal water, tidal waves, high water, and overflow of any body of water, or their spray, all whether driven by wind or not;

b. Release of water held by a dam, levy (sic) or dike or by a water or flood control device;

All other provisions of this policy apply.

(Doc. 568, Hartford Policy, App. at INS 74-75). Thus, Hartford's Amendatory Endorsement Specifically Excepted Perils defines the term "flood" and specifically includes the release of water held by a levee or a flood control device.

VI. Parties' Contentions

Defendants[8] contend that all water damage caused by the canal breach is excluded from coverage as these policies exclude coverage for water damage resulting from a "flood" and that clearly the inundation of the City of New Orleans caused by the failure of its levees was a "flood." Seeking the broadest possible definition of the term, defendants maintain that "flood" is not limited to natural events. For this proposition they maintain that under Louisiana law, a court is "required to interpret the term using its plain, ordinary and generally prevailing meaning" and should not enlarge insurance coverage beyond that which is reasonably contemplated." *Cadwallader*, 848 So.2d at 58344.

Defendants rely on *Kane v. Roby Ins. Co.*, 768 P.2d 678, 681 (Colo. 1989) for this proposition. In *Kane*, plaintiffs' property had been damaged by a flood caused by a dam failure. Plaintiffs had in place a certain all-risk policies covering direct physical loss thereto except that which was excluded. The water damage exclusion was identical to the ISO policy noted above; it excepted "flood, surface water, waves, tidal water or tidal waves, overflow of streams or

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[8] The Court would note that while a consolidated memorandum was flied on behalf of the insurers as instructed by the Court, individual arguments were also made. The Court has reviewed these and will only address those specific arguments when they diverge in a relevant way from the whole.

other bodies of water or spray from any of the foregoing, all whether driven by wind or not." *Id.* at 680. The insureds maintained in that suit that the term "flood" was ambiguous as it was not defined and no distinction was made between naturally and artificially caused floods, and as such should have been limited to natural events.

A divided Supreme Court of the State of Colorado held for the insurers. The majority stated:

> The generally accepted meaning of the term "flood" does not include a distinction between artificial and natural floods. For example, *Webster's New World Dictionary* 535 (2d ed. 1974), defines "flood" as: "[An overflowing of water on an area normally dry; inundation; deluge. . ." *Webster's Ninth New Collegiate Dictionary* 474 (9th ed. 1988), defines the term as; "[A] rising and overflowing of a body of water esp [ecially] onto normally My land. . . ." *Black's Law Dictionary* (5th ed. 1979), contains a similar definition; "An inundation of water over land not usually covered by it. Water which inundates area of surface of earth where it ordinarily would not be expected to be." The inundation of insureds' normally dry land falls squarely within these generally accepted definitions of the term "flood."[FN2] *See Bartlett v. Continental Divide Ins. Co.*, 697 P.2d 412 (Colo.App.1984) (no distinction in insurance policy between natural and artificial causes of flood; to make such distinction would be to rewrite the terms of the policy).

Id. at 681.

Thus, the majority rejected the concept that causation—that is the failure of a man-made object

which would cause an "artificial" flood as opposed to a naturally occurring flood—would influence the interpretation of the exclusion. In so finding, it distinguished a prior decision, *Ferndale Development Co. v. Great American Ins. Co.*, 34 Colo. App, 258, 527 P.2d 939 (Colo. App.1974), wherein a Colorado appellate court had found the term "flood" ambiguous and found coverage where a broken city water line caused the "inundation of the footings and foundations of a partially completed condominiums being constructed by the insured." The majority reasoned that in *Ferndale*, "the term 'flood' was ambiguous not only because the water was released from a man-made object, but also because a water main is not so clearly a 'body of water,' and because "the amount released was less clearly an 'inundation' or 'deluge'."

Plaintiffs in *Kane* also contended, relying on *Koncilja v. Trinity Universal Ins. Co.*, 528 P.2d 939 (Colo. App. 1974), that even if the flood exclusion applied, the "efficient moving cause" of their loss was a covered risk, that is the third party negligence leading to the failure of the Lawn Lake Darn, and coverage should be available. In *Koncilja*, the damage at issue was caused by a broken water pipe embedded in the floor of the house which caused the ground beneath the house to subside which, in turn, caused the house to settle and crack. The homeowners' insurance policy at issue insured against "loss occurring as a result of '[accidental discharge, leakage or overflow of water or steam from within a plumbing . . . system.'" The claim was initially denied based on an exclusion of losses "'caused by, resulting from, contributed to, or aggravated by any earth movement [or] water below the surface of the ground.'" *Kane*, 768 P.2d at 684, citing *Koncilja*, at 940. The *Konciija* court applied the efficient proximate cause rule that

where there is a concurrency of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately. *Id.* The *Koncilja* court noted that while the excluded settling of earth may have "operated more immediately in producing the damages, the predominate or efficient proximate cause of the loss was the accidental leakage from the plumbing system." *Id* Thus, the *Koncilja* court found that as these provisions gave rise to an ambiguity as to the extent of policy coverage, the contract should be construed in favor of coverage.

The majority of Colorado supreme court found that there was no such conflict of provisions of coverage in the *Kane* policies. The majority stated:

> Third party negligence is not a covered risk which creates inconsistency or ambiguity between the language of coverage and the language of exclusion. Although loss from third party negligence is covered under an "all risk" policy, that coverage is expressly subject to the language of the exclusions included in the policy. Under the policy language here, the insureds' loss which is caused by, resulting from, contributed to or aggravated by a flood is excluded regardless of the existence of any other contributing cause. Unlike in *Koncilja*, there is no inconsistency or ambiguity in the inclusionary and exclusionary language of the insurance policies in this case.
>
> Moreover, the "efficient moving cause" rule set forth in *Koncilja* does not control our decision in this case. We believe that the "efficient moving cause" rule, if it were to be adopted by this court, must yield to a well-settled principle of law:

> namely, that courts will not rewrite a contract for the parties. *See, e.g., Republic Ins. Co. v. Jernigan*, 753 P.2d 229, 232 (Colo.1988).

Id. at 685. Thus, the majority held that the term "flood" in the insurance policies at issue included both naturally and artificially caused floods.

Other cases cited by the defendants herein for the proposition that the term "flood" in an insurance policy includes both naturally and artificially caused floods include *Bartlett v. Cowl Divide Ins. Co.*, 697 P.2d 412, 413 (Colo. Ct. App. 1984) (lower court decision concerning apparently the same Lawn Lake Dam collapse finding no distinction between natural and artificial causes where dam failure caused damage); *TNT Speed & Sport Ctr., Inc. v. American States Ins. Co.*, 114 F.3d 731 (8th Cir. 1997) (no coverage where vandals removed sandbags and dirt from levee causing levee to break); *Pakmark Corp. v. Liberty Mut Ins, Co.*, 943 S.W. 2d (Mo. Ct. app. 1997) (no coverage where levee broke); *E.B. Metal & Rubber Indus. Inc. v. Federal Ins. Co.*, 444 N.Y.S. 2d 321 (N.Y. App. Div. 1981) (no coverage for water damaged caused by improperly constructed and maintained dike that failed).

Plaintiffs maintain that the *Kane* majority is incorrect. They argue that in the context of this exclusion, "flooding" is limited to natural events. The "flooding" was not caused by the overtopping of the levees or by rainwater filling the City with surface water.

Plaintiffs cite to *Riche v. State Farm Fire and Casualty Co.*, 356 So.2d 101 (La. App. 1st Cir. 1978), *writ denied*, 358 So.2d 639 (La. 1978). In this case, plaintiff sought to recover under his homeowner's

policy for the loss of his fishing gear which was on the bass boat of a third-party which sank during a windstorm. The plaintiff maintained that his damage was a direct loss of property defined as "unscheduled personal property" caused by a windstorm which was a named peril under his homeowner's policy . The insurer maintained that the loss was instead caused by wind making waves from surface water, waves causing water to flow into the boat, compounded by a defective bilge pump. Thus, the loss was not caused by windstorm, but by the sinking of a boat. *Id.* at 102.

The appellate court noted that the "direct loss" means the dominant and efficient cause of the loss and that as such, relying on *Roach-Strayhan-Holland Post v. Continental Ins. Co.*, 237 La. 973, 112 So.2d 6s0 (La. 1959) wherein it states "that it is sufficient, in order to recover upon a windstorm insurance policy not otherwise limited or defined, that the wind was the proximate or efficient cause of the loss or damage, notwithstanding other factors contributing thereto." The trial court had held that coverage for the personal property was excluded under the water exclusion provision which provided:

> This policy does not insure against loss:
>
> 3. Caused by, resulting from, contributed to or aggravated by any of the following:
>
> (a) Flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not. . ."

Id. at 103. The appellate court found that when read as a whole, [this exclusion] contemplates only such damage caused by water which has risen over and covered areas not ordinarily .covered by water." *Id.* at

103-04 (emphasis added). The court found this exclusion was inapplicable to damage caused by a windstorm or resulting waves over a body of water, finding that "this interpretation is in line with the rule of construction that exclusionary clauses are strictly construed. *See Bezue v. Hartford Acc. and Indem. Co., Hartford Conn.*, 224 So.2d 76 (La. App. 1st Cir. 1969)."

Plaintiffs contend that this case demonstrates that Louisiana courts have construed this water damage exclusion as requiring the rising over of water which was not the manner in which the water at issue is alleged to have inundated the insureds' homes. Rather, they maintain it was the negligence of OLD that caused the canal walls to collapse.

Thus, the salient question becomes whether, in the context of an all-risk policy where coverage is provided for direct loss to property, these insurance provisions which exclude coverage for water damage caused by "flood" clearly and unambiguously exclude from coverage damages caused by the alleged third party negligence of OLD which plaintiffs contend caused a section of the floodwall at the 17th Street Canal to break causing water to enter the streets of the City of New Orleans and homes of the plaintiffs in this suit. While words and phrases in insurance polices are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning, an ambiguity arises where a term is susceptible to two reasonable interpretations. *Cadwallader*, 848 So. 2d at 580 *citing Carrier*, 759 So.2d at 43-44. Simply put, the question before the court is whether it is reasonable to find in the absence of further definition or provision in the ISO policy that there are two inter-

pretations of the term "flood"—one which encom passes both a "flood" which occurs solely because of natural causes and a "flood" which occurs because of the negligent or intentional act of man and one which limits itself only to a flood which occurs solely because of natural causes.

VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term

The word "flood" can be used as a verb or a noun. In the context of the exclusionary language[9], it is used as a noun[10]. The complete definition in Web-

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[9] "Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind" is the exact language of the exclusion.

[10] The verb is likewise defined as:

> 2flood ... *vt* la: to cover or overwhelm with a flood: INUNDATE, DELUGE <the river—ed the lowlands> b: to cover or cause to be covered with water or other fluid <in some places it is economical to irrigate by—*ing* the fields at regular intervals> <—the bearings with oil> 2-: to fill more or less completely with water or other fluid: a; to increase the elevation of the water in (a channel) esp. in splashing logs or in nullifying the effectiveness of a fall over a dam; *also:* SPLASH *b:* to supply to (the carburetor of an internal—combustion engine) an excess of fuel sufficient to raise the furl level in the float chamber above the fuel nozzle : to fill (as a compartment of a submarine) with water admitted (from the sea d: to fill (an oil sand) with water to expel the oil *e:* to apply excessive ink to in printing <the form was—*ed* and the halftones are too heavy and dark> 3a: to fill to frill capacity or to excess <shoppers—al the streets> <afferent impulsed—the brain in certain hysteric states> <—*ing* the mails with circulars> b: to distribute something in or provide with something in large quantities <--*ing* the country with ads> <the romm was—*ed* with light> *vi* is To pour or issue like a flood <the

sters' Third New. International Dictionary of the English Language Unabridged (1993) is:

> 1 flood ... *n .1 archaic:* a body of moving water (as a river or stream) esp. when large 2a: the flowing in of the tide: the semidiurnal swell or rise of water in the ocean ,there is a tide in the affairs of en which, taken at the —, leads on to fortune— Shak.>— opposed to *ebb* b: the highest point of a tide <the tide is nearly at the —> 3a: *rising and overflowing* of a body of water that covers land not usu. under water: DELUGE, FRESHET <a covenant never to destroy the earth again by — John Milton> — used with *the* to identify a flood os esp. severity or local interest <still date things around here from the —, which was about the biggest excitement we ever had> or, usu. cap., the worldwide deluge reported in Gen 7 <the *Flood* in the days of Noah. b(I): an outpouring of considerable extent <gave way in a — of tears> (2): a great downpour <raining in —*s*> 4: the element water <the rocky shore that forms a barrier between earth and —> < willing to go through fire and — to gain his objective> 5a a great stream of something (as light or lava) that flows in a steady course b: a large quantity widely diffused: SUPERABUNDANCE <a — of spurious bank notes> >soon had a — of invitations> 6: FLOODLIGHT syn see FLOW

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milk—*ed* over the table> : OVERFLOW <wine—*ing* from the glass as her hand shook> b: to become filled to excess with some fluid <our cellar—*s* after every heavy rain> *of a tide:* to run high <could tell how the tide was—*ing* — G.W. Brace> 2: to have an excessive menstrual flow or a uterine hemorrhage after childbirth.

Explanatory Note 12.4 which explains the numerical divisions contained in the definition states:

> The system of separating by numbers and letters reflects something of the semantic relationship between various senses of a word. It is only a lexical convenience. It does not evaluate senses or establish and enduring hierarchy of importance among them. The best sense I the one that most aptly it's the context of an actual genuine utterance.

Id. at 17a. The Compact Oxford English of Current English Dictionary (2005) defines "flood" as *"an overflow* of a large amount of water over dry land." (emphasis added).

Other definitions include:

> A general and temporary condition of partial or complete inundation of normally dry land areas from (1) *overflow of inland or tidal waters,* (2) the unusual *accumulation and runoff* of surface waters from any source, or (3) abnormal, flood-related erosion and undermining of shorelines. Flood also means inundation from mud flows caused by accumulations of water on or under the ground, as Iong as the mud flow and not a landslide is the proximate cause of loss.

InsWeb Article: Property Insurance Terms provided by BISYS Education Services, Inc. (emphasis added) *See* http://www.insweb.comilearningcentertglossary iproperty-fhtm. The American Heritage Dictionary of the English Language: Fourth Edition (2000) defines it as an *overflowing* of water onto land that is normally dry. (emphasis added). Cambridge Dictionaries Online defines it as "a large amount of water covering an area that is usually dry." *See*

http://dictionary.cambridge.org. Thus, the majority of the definitions of the noun "flood" found independently by the Court require an "overflowing" or an "overtopping".

Accordingly, based on these definitions of "flood", it is clear to this Court that implicit in the "overtopping" definitions, a natural event caused by rain or tide is contemplated. Thus, these definitions alone provide evidence that a reasonable interpretation of the term "flood" would be inundation caused by a natural event.

This analysis, however, is further buttressed when examined in the "sense" that is gained by the context of the word as noted in the explanation of definitions contained in *Webster's Unabridged*. The term "flood" is unequivocally contained in an exclusionary clause in the insurance policies at issue. As noted, "once coverage has been extended, . . . , it should be withdrawn only when exclusion is established with certainty." *Pullen v. Employers' Liability Assur. Corp.*, 89 So.2d 373, 377 (La. 1956). Thus, the plethora of insurance case law where the issue of causation is at play with respect to the application of a water damage exclusion is a further demonstration that this term is subject to two reasonable interpretations.

VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations

A. "Flood" is Limited to Naturally Occurring Events

While defendants have cited to a number of cases where courts have found "flood" to be unambiguous and have denied coverage where even negligence or intentional acts have caused the water damage at

issue, there are other cases where courts have held that the term "flood" contemplates only a naturally occurring event. In *Popkin v. Security Mut. Ins, Co.*, 48 A.D.2d 46 (N.Y. S.Ct. App. Div. 1975), the court found that the term "flood" did not contemplate water damage sustained as the result of a broken water main. It noted that the term connotes an inundation or deluge. The court continued, basing its reasoning on the *ejusdem generic* rule and *noscitur a sociis*, "Even assuming that the word 'flood' is to be given a more generic meaning as an overflowing abundance or a great quantity, it must be noted that the other terms utilized in the exclusionary clause containing such word relate to natural pheuomena."[11] *Id* at 495 (emphasis added). Another New York court, cited *Popkin* concluding that the exclusionary provisions pertain only to damages arising from natural causes. *Ender v. National Fire Ins. Co. of Hartford*, 169 A.D.2d 420, 421 (N.Y. S. Ct. App. Div. 1991).

An Arkansas appellate court likewise found that a similar water exclusion as presented in the State Farm policy contemplated only flooding that results from a natural cause. In *Ebbing v. State Farm Fire & Cas. Co.*, 1 S.W.3d 459 (Ct. App. Ark. Div. III 1999), insureds sought coverage for water damage caused by a burst pipe where their State Farm homeowners policy excluded coverage for water damage "meaning flood, surface water, waves tidal water, overflow of a

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[11] That exclusionary clause provided in relevant part that the policy at issue did not insure against "'(l)oss caused by, resulting from, contributed to or aggravated by any of the following: . . . 2. flood, surface water, waves, tidal water or tidal wave, *overflow of* streams or other bodies of water or spray from any of the foregoing, all whether driven by wind or not; . . .

body of water, or spray from any of these, all whether driven by wind or not. . . ." The court examined the meaning of both the term "surface water" and "flood", Adopting the Colorado appellate court's reasoning in *Ferndale, supra*, it found that its common usage applies to "water occasioned from natural events rather than a burst water main."

In a Massachusetts case, *Mellon v. Hingham Mut. Fire Ins. Co.*, 472 N.E.2d 674 (Mass. App. Ct, 1984), insureds suffered damages after a drainage pipe beneath a basement broke and were denied coverage. In interpreting an all-risk policy of insurance clause which excluded loss 'caused by, resulting from, contributed to or aggravated by . . . water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through basement . . . floors," the appellate court noted, "An 'all risk' policy is intended to insure against a 'fortuitous' event. . . . Moreover, such fortuities are insured against even if they are not specified in the policy. As an insurer has the option to exclude from coverage certain risks, . . . it is not surprising that 'all risk' policies contain specific exclusions." *Id.* at 675 (citations omitted). The court continued:

> When we apply the foregoing principles in the instant case the reasons why the plaintiffs should prevail become apparent. The plaintiffs may recover if the bursting of the drainage pipe is considered a fortuity and if such fortuity has not been specifically excluded. With respect to the former, Hingham concedes that the damage was incurred as a result of a fortuity. The trial judge found, and we agree, that the "loss was caused by an accidental break rather than a

> natural occurrence." As such, it is the kind of risk an "all risk" policy is designed to cover.

Id. at 675-76 (footnote omitted). Thus, Massachusetts viewed a similar exclusion as only excluding damages caused by natural circumstances.

As noted in *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W.Va. 1998):

> A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that "one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance." C. Marvel, *Division of Opinion among Judges on Same Court or among other Courts or Jurisdictions Considering same question, as Evidence That Particular Clause of Insurance Policy is Ambiguous,* 4 A.L.R.4th 1253 § 2[a] (1981).

Id. at 485 n. 5 (emphasis added). So, this diversion of opinion gives support to the conclusion that the ISO flood exclusion is ambiguous.

B. Distinguishing Factors of Cases in Which "Flood" Included Water Damage Caused by Negligent or Intentional Acts from the Case at Bar

Furthermore, the primary cases on which defendants' rely can be distinguished. For instance, with respect to *TNT Speed & Sport center, Inc. v. American States Ins. Co.*, 114 F.3d 731 (8th Cir. 1997), the flood at issue had resulted from an unknown third party's removal of sandbags and dirt

from levee surrounding city from rising river. The Eighth Circuit did not consider whether the term "flood" referred only to naturally occurring events or whether it included man-made causes. Rather in that instance it based its analysis on the "anti-concurrent' cause clause finding that it defeated the efficient proximate cause doctrine and thus the plaintiff's damages were excluded under the policy.[12] Thus, the issue as to whether "flood" concerned only natural occurring events was not addressed.

In *Fakmark Corp. v. Liberty Mut. Ins, Co.*, 943 S.W.2d 256 (Mo. Ct. App. 1997), likewise, whether "flood" was limited to naturally occurring events and did not include manmade events was not contemplated. In this case, sewerage backed up into insured's building at the same time water overflowed the Missouri River entering the insured's property. The focus of that case again was the anti-concurrent clause.

In *E.B. Metal & Rubber Ins. Inc. v. Fed Ins. Co.*, 444 N.Y.S.2D 321 (N.Y. S. Ct. App. 1981), a dike on a canal gave way and water inundated the insured's property. The policy at issue in that case excluded damages caused by "'flood meaning waves, tidal water or tidal wave, rising (including overflowing *or breaking of boundaries)* of lakes, reservoirs, rivers,

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[12] As noted, Louisiana courts have recognized the primacy of the efficient proximate cause doctrine and, to this Courts knowledge, having examined the issue for these purposes, no Louisiana courts has directly held that an anti-concurrent cause clause automatically overrides concerns of efficient proximate cause. Nonetheless, that being said, this Court recognizes that parties may contract in any manner they want and could obviously exclude coverage using an anti-concurrent cause clause. However, that exclusion must be clear and unambiguous.

streams or other bodies of water, whether driven by wind or not. The court there simply found that the damages were excluded as long as there were "rising waters which break through boundaries and flow upon the insured's land to constitute a flood." *Id.* at 663 (emphasis added). This specific language is not present in the ISO policy at issue herein.

C. The Dissent in *Kane* Further Demonstrates the Reasonableness of the Two Interpretations

Another illustration of the ambiguity or tension between these two interpretations of the term "flood" is contained in the minority opinion found in *Kane* wherein a three-person minority wrote a stinging dissent. The dissent stated unequivocally that the term "flood" as used in the policy was ambiguous and that the "'all-risk' policies in question covered] damage caused by the negligent acts of a third party or any other source not specifically excepted from coverage by the exclusionary clauses of the polices." *Kane*, 768 P.2d at 687. As to the argument that the unmodified term "flood" should be interpreted to refer only to inundation caused by natural conditions or events, the minority noted:

> The plaintiffs argue that "flood" should be interpreted to refer only to inundations caused by natural conditions or events. In this case, the term "flood" in the exclusionary clauses is found in the context of natural causes of flooding, i.e., "flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not." This in itself indicates that the term "flood" could be interpreted as encompassing only natural causes. *Cf. Bly v. Auto Owners Ins. Co.*, 437 So.2d 495, 496-

97 (Ala.1983) (term "earth movement" in insurance policy encompasses only natural phenomena involving earth movement because examples mentioned in policy are only natural phenomena); *Ariston Airline & Catering Supply Co. v. Forbes*, 211 N.J.Super. 472, 511 A.2d 1278, 1284 (Law Div.1986) ("words 'earth movement,' like other language in policies being construed, must be read in the light of other words contained in the same exclusion").

Several courts have interpreted similar insurance policy provisions in just this way. *See, e.g., Robert Dorsen, Inc. v. Aetna Casualty & Sur. Co.*, 562 F.Supp. 495, 496 (D.D.C.1983). *See also* 5 J. Appleman, *Insurance Law and Practice* § 3145, at 462-63 (1970). Indeed, in the present case the district court initially interpreted the policy provisions to encompass only flooding by natural causes and not to include "a situation of an artificially-impounded or contained body of water that escapes and causes damage." *Kane v. Royal Ins. Co.*, No. 83CV603, slip op. at 2-3 (Dist. Ct. Larirmer Co., Feb. 28, 1984) (Dressel, 3.) (the district court later reversed this decision since it viewed as binding the Colorado Court of Appeals decision in *Bartlett v. Continental Divide Insurance Co.*, 697 P.2d 412 (Colo.App.1984)). These authorities, of course, do not compel us to take the same view, but they do provide support for a conclusion that the term "flood" as contained in insurance policies is ambiguous. *See* Annot., *Division of Opinion as Evidence that Particular Clause of Insurance Policy is Ambiguous*, 4 A.L.R. 4th 1253 (1981) (existence of differing interpretations of a term among or within jurisdictions is evidence of ambiguity of the term).

> In sum, I believe the term "flood" as contained in the insurance policy is ambiguous. *See Ferndale*, 34 Colo.App. 258, 527 P.2d 939 (1974); *Mateer v. Reliance Ins. Co.*, 247 Md. 643, 233 A.2d 797 (1967) (term "flood" is latently ambiguous when used in an insurance policy). Ambiguous terms in an insurance policy are to be construed most strongly against the insurer. *Republic Ins. Co. v. Jernigan*, 753 P.2d 229, 232 (Colo.1988); *Reed v. U.S. Fidelity & Guar. Co.*, 176 Colo. 568, 572, 491 P.2d 1377, 1379 (1971). Therefore, I would hold that inundation caused by the breakage of a dam is not excluded from coverage by the flood provisions of these policies.

Id. at 68687. Likewise, the minority found that the overruling of *Koncilja* as it concerned the jettisoning of the efficient proximate cause rule incorrect. *See discussion, supra*, at 21 The minority reasoned:

> The majority apparently concedes that third party negligence, such as negligence in the design, construction, or operation of the dam, is covered by the "all risk" policies in this case. However, the majority also concludes that there is no inconsistency because that coverage is "expressly subject to the language of the exclusions included in the policy." Maj. op. at 685. This approach has the effect of treating the events leading up to the damage of the petitioners' place of business as a single cause by implicitly saying that third party negligence is covered under the policy but not if the third party negligence causes flooding. I believe this approach misapprehends the rationale underlying *Koncilja*. There was more than one "cause" of the petitioners' damage in this case. There was third party negligence in

the design, construction or operation of the Lawn Lake Dam or some other cause that resulted in failure of the dam, and there was the "flood" which was "caused" or put in motion by the precipitating cause of the breakage of the dam.

In *Hatley v. Truck Insurance Exchange*, 261 Or. 606, 494 P.2d 426 (1972), vandals caused flooding of the plaintiffs' place of business. Vandalism was covered by the policy but loss resulting from "flood," "surface water" or "water below the surface of the ground" was excluded from coverage. The Oregon Supreme Court did not hold, as the majority in this case apparently would, that the vandalism that caused flooding was not covered by the policy. Rather, the court, using an analysis very similar to that *in Koncilja,* determined that there were two causes of the plaintiffs' damage and that the policy covered this damage since the vandalism "cause" was the direct or immediate cause of the water damage. *Id.* 494 P.2d at 431-32, *Accord Beauty Supplies, Inc. v. Hanover Ins. Co.*, 526 S.W.2d 75 (Mo.Ct.App.1975); *Franklin Packaging Co. v. California Union Ins. Co.*, 171 N.J.Super, 188, 408 A.2d 448 (App.Div.1979).

I believe that this is also the proper method of analysis under *Koncilja.* Third party negligence or some other source resulting in breakage of the dam was one cause of the damage to the petitioners' place of business and the "flooding" was another cause. However, because the precipitating cause of the failure of the dam set in motion the flooding, the policy should be construed in favor of coverage, if the precipitating cause is not

itself excluded from coverage. *See Koncilja*, 35 Colo.App. at 30-31, 528 P.2d at 940-41.

Id. at 687-88.

Nonetheless, the Court must note that the issue of efficient proximate cause as it relates to an anti-concurrent cause clause arises only where a covered peril and an excluded peril are present. Thus, if this Court were to find that the "flood" exclusion does not encompass flooding caused by negligent or intentional acts, the issue of efficient proximate cause and/or the applicability of an anti-concurrent cause clause is not triggered at this stage of the litigation. However, the Court does agree that exclusions that are clear may also eviscerate the doctrine of efficient proximate cause. Nonetheless, as this litigation proceeds, if it is shown that an insured premises sustained damage from a covered peril, i.e. wind or water damage caused by a failed levee caused by negligence, and a non-covered peril, i.e. naturally occurring flooding such as overtopping of a levee, then the Court must determine the applicability and enforceability of the anti-concurrent cause clause.

D. Earth Movement Litigation Provides Further Demonstration of Reasonableness of Two Interpretations—Natural v. Man-Made

Additional support for the proposition that exclusions can be limited to natural occurring incidents as opposed to those caused by the negligent or intentional acts of man can be found in cases where the earth movement exclusions of all-risk policies are at issue. In *Murray v. State Farm Fire and Cas.*, 509 S.E.2d I (W.Va. 1998), the West Virginia supreme court considered certain earth movement exclusions where policy holders sought coverage for damages

caused by rocks falling from the highwall of a 40-year old abandoned rock quarry situated next to their homes. The insurers initially denied coverage based on exclusions for losses resulting from "earth movement, including but not limited to . . . landslide . . . [or] erosion." *Id.* at 483. The circuit court granted summary judgment in favor of the insurers, and the supreme court reversed. Evidence in the record demonstrated that negligent construction of the highwall behind the plaintiffs' residences contributed to the rockfall. Using the same rules of insurance contract interpretation as Louisiana, the court noted:

> On the one hand, the exclusions cited in the defendant's policies could bar coverage for solely *natural* events such as earthquakes, volcanic eruptions, and sinkholes. On the other hand, the same exclusions refer to events which could be *man-made*, such as subsidence or earth movement caused by equipment or a broken water line. Or as alleged in this case, earth movement could be caused by *both man and nature* over a period of time, such as landslides, mudflows, or the earth sinking shifting or settling. Because the policy language is reasonably susceptible to different meanings, we believe that the earth movement exclusions in the insurance polices at issue are ambiguous, and must have a more limited meaning than that assigned to it by the defendants.

Id. at 485. The court then applied the two doctrines of *ejusdem generis and noscitur a sociis* to conclude that both earth movement exclusions at issue therein must be read "to refer only to phenomena resulting

from natural, rather than man-made forces." *Id.* at 486. The court stated:

> Therefore, when an earth movement exclusion in an insurance policy contains terms not otherwise defined in the policy, and the terms of the exclusion relate to natural events (such as earthquakes or volcanic eruptions), which events, in some instances, may also be attributed to a combination of natural and manmade causes (such as landslides, subsidence or erosion), the terms of the exclusion must be read together and limited to exclude naturally-occurring events rather than man-made events.

Id.

It should be noted that in *Change, Inc. v. Westfield Ins. Co.*, 542 S.E.2d 475, 479 (W.Va. 2000), the West Virginia supreme court subsequently applied the same analysis to the ISO water exclusion to find that there was coverage provided where a water main owned by the City of wheeling ruptured and damage the offices of the insured. The court stated:

> The doctrine of *noscitur a sociis* dictates that language should be construed in accordance with the words which are its associates. The Court observes that the words of the exclusionary language specifically exclude damage by flood, surface water, waves, tides, tidal waves, etc. these words all refer to water arising from natural causes or from natural disasters. On the other hand, the language of the exclusionary clause includes in coverage damage by sprinkler leakage, that is, water from a manmade system."

Id. at 479.

The Florida supreme court likewise found that an ISO earth movement exclusion applied only to earth movement brought about by natural events and did not apply to damage caused by a man-made event such as blasting. In *Fayad v. Clarendon Nat'l Ins. Co.*, 899 Sold 1082 (Fla. 2005), the court utilized the same principles of insurance contract interpretation noting that "if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous. *Id.* at 1086 (citations omitted). It also noted that "exclusionary clauses are construed more strictly against the insurer than coverage clauses." *Id.*

In its analysis the court noted the practical differences for the insurer between losses caused by natural occurrences as opposed to man-made occurrences, The insurer would have the right to subrogation against the tort-feasor in the event that the loss was caused by a man-made event, rather than a natural occurrence. This factor from an underwriting standpoint supports the proposition that the insurer was excluding a loss for which it had no recourse. The court also remarked that the exclusion at issue in *Fayad* did not contain the State Farm lead in provision which excludes "regardless of the cause" earth movement, and that the vast majority of the courts found the earth movement provision limited to damage caused by natural phenomena. Since the cause of the insured's loss was blasting, which was not expressly listed as a causal event that would preclude coverage for resulting damage, the court again used the principle of *ejusdem generis* and limited the exclusion to earth movement caused by a natural event.

Finally, it is also important that in *Peach State Uniform Serv. Inc. v. American Ins. Co.*, 507 F.2d 996 (5th Cir. 1975), the appellate court reversed the jury findings of the district court with respect to the applicability of a water exclusion and an earth movement exclusion where the foundation of a building gave way and a portion of the building collapsed after heavy rains. The insurer maintained that the undermining of the foundation was caused by run-off water washing away uncompacted fill dirt from underneath its foundation and thus the damage was excluded from the "all-risk" policy based on the earth movement and water damage exclusions. Tice insureds maintained that the collapse was caused by the caving in of a portion of a sewer line which ran directly underneath the building in question.

The court in commenting on the water damage exclusion[13] noted, "while the term water damage may be used in the abstract to refer to any sort of damage worked by water or the motion of water, . . . here we must take the phrase in context, not in the abstract." *Id.* at 998. The court concluded that "the term water damage in this context constitutes a limitation on the sorts of damages from the enumerated water which were excluded from coverage." It further concluded

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[13] The exclusion provided: "This policy does not insure against loss or damage resulting from: . . ." (N) water damage casued by, contributed to, or aggravated by any of the following:

(1) Flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing..

(2) Water which backs up through sewers or drains,

(3) Water below the surface of the ground, . . .

Id. at 998

that the exclusion was ambiguous and found that it was inapplicable to the damages at issue. *Id* at 999. The court then examined the earth movement exclusion[14] and using the principle of *ejusdem generis* found it applicable to damages caused by actual movement of earth itself, not superficial effects of external forces.

E. Distinctions from Civilian Approach Further Demonstrates Inapplicability of *Kane* to the Case at Bar

In considering whether the *Kane* majority approach should guide this court, certain distinguishing facts militate against such a course of decision, In the *Kane* analysis, the fact that the term "flood" was imbedded in an exclusion rather than in the coverage provision, was apparently ignored in that the Court applied the broadest possible definition to flood, rather than narrowly construing an exclusion. It appears that the definition used by the *Kane* court was more akin to the definition of the verb "flood" than the noun "flood." Thus, this analysis ignores one basic tenet of Louisiana law—that is an insurance policy is a contract of adhesion and that an exclusion must be narrowly construed. Furthermore, another important distinction can be found in the majority opinion of *Kane*.

The majority also noted in distinguishing *Ferndale,* as discussed, *supra* at 20 that:

> In addition to the factual distinction between *Ferndale* and this case, the definition of "flood

[14] This exclusion provided "this policy does not insure against loss or damage resulting from: (B) Earthquake, volcanic eruption, landslide or other earth movement. . ."*Id.* at 999.

> waters" upon which the *Ferndale* court relied supports our conclusion that the term "flood" is not ambiguous under the facts of this case. The *Ferndale* court quoted from 5 S. Appleman, *Insurance Law. and Practice* § 3145 (1970), as follows: " 'Flood waters' are those waters above the highest line of the ordinary flow of a stream, and generally speaking they have overflowed a river, stream, or natural water course and have formed a continuous body with the water flowing in the ordinary channel. . . ." *Ferndale*, 527 P.2d at 940.
>
> Although leakage from a ruptured city water line does not fall within this definition, the rising and overflowing of Fail River does. This definition makes no distinction between naturally and artificially caused floods, and in this case, the Fall River clearly overflowed "above the highest line of [its] ordinary flow."

Kane, 768 P.2d at 681-82. Thus, it appears that the failure of the Lawn Lake Dam was caused by overtopping which would factually distinguish it from the facts before the Court where the allegations are not of flooding caused by the flood wall's failure from overtopping, but rather the flood walls' collapse when faced with conditions they were allegedly designed to withstand.

Another distinction can be found with respect to the *Kane* majority in its discussion of *Koncilja, see discussion, supra*, 20-21. As noted, the Colorado supreme court stated that if the "efficient moving cause" rule "were to be adopted by this court," it must yield to the "a well-settled principle of law: namely, that courts will not rewrite a contract for the parties. *See, e.g., Republic Ins. Co. v. Jernigan*, 753 P.2d 229,

232 (Colo.I988)." *Kane*, 768 P.2d at 685. This statement would indicate that at least the Colorado supreme court had not embraced the efficient moving cause principle. However, Louisiana's courts consistently apply the efficient proximate cause rule in resolving coverage issues. *Loris v. Aetna Ins. Co.*, 255 La. 721, 232 So.2d 490 (La. 1970) which again distinguishes the *Kane* majority approach from the case at hand.

IX. Application of Legal Principles to the Policies Before the Court

A. ISO Water Damage Exclusion

1. ISO Water Damage Exclusion Standing Alone Is Ambiguous and Must Be Interpreted Against the Insurer to Find Coverage

Based on these principles, the Court now examines the "Water Damage Exclusion" in the ISO policies in the context of a Rule 12(b) motion, where the Court is required to take all of the allegations as true. The fundamental argument made by the ISO insurers is that the word "flood" is all encompassing. They point out that the water damage which occurred to homes and businesses in New Orleans has been referred to as a "flood" in newspapers, general reports and many other sources. And thus, the water exclusion applies to the coverage sought by policy holders herein.

As demonstrated earlier, the word "flood" has numerous meanings. It is defined in virtually all dictionaries first as a noun then as a verb. In the policies being examined by the Court it is used as a noun. As noted, most of the definitions of the noun imply encroachment of water caused by an act of nature. Furthermore, this exclusion has been the subject of differing interpretations in the juris-

prudence which further demonstrates that it is susceptible of two reasonable interpretations. As such, under Louisiana civilian principles and *the jurisprudence constant*, this Court finds the ISO Water Damage Exclusion ambiguous.

The policies before the Court are "all-risk" policies, and any exclusion must be clear and unambiguous. "Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract" La. Civ. Code art. 2048. Thus, this Court is required to examine the insurance policies before it in the context of the purpose of the policy including the scope of the risks against which it purports to insure. "Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. Civ. Code art 2050. Water damage could occur to a home or business for a myriad of reasons and any number of causes< The causes can be natural, *i.e.* overflow of river banks, intense rain, etc., or man-made, *i.e.*, the failure of a dam or levee, a vandal destroying a above ground swimming pool, a vehicle hitting a water main, etc.

As a general rule, insurance policies should be construed to effect, not deny coverage. *Holden v. Connex-Metalna*, 2001 WL 40994 at *2 (E.D.La. Jan. 16, 2001) *citing Breland v. Schilling*, 550 So.2d 609 (La. 1989). Furthermore, as previously noted where the Court finds an ambiguity, it must ascertain how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered and fulfill the reasonable expectations of the insured even though a earful examination of the policy provisions indicate that such expectations are

contrary to the expressed intention of the insurer. *Louisiana Guar. Assoc.*, 630 So.2d at 764 and n. 19.

It is the considered opinion of this Court that because the policies are all-risk, and because "flood" has numerous definitions, it reasonably could be limited to natural occurrences. Simply put, the language of the ISO Water Damage Exclusion chosen by the insurer is unclear. Indeed, the broad definition defendants seek to employ—that is that the term "flood" means the inundation of usually dry land by water— makes the remaining part of the exclusion superfluous. The ensuing words "waves, tidal water, overflow of a body of water or spray from any of these, whether or not driven by wind" all are instances relating to natural events which can cause inundation of usually dry land. Thus, to use the broadest definition of the term "flood" in interpreting this exclusion, would render the rest of the clause useless.

Under the principles of Louisiana law, the Court is constrained to find the language ambiguous. To find otherwise, leads to absurd results. Once this finding is made, the Court is further constrained to interpret it against the *insurer*. "If there is any doubt or ambiguity as to the meaning of a provision in an insurance policy, it must be construed in favor of the insured and against the insurer. *See* La. C.C. art. 2056.[15] When the ambiguity relates to an exclusionary clause, the law requires that the contract be interpreted liberally in favor of coverage." *Arnette v. NPC services, Inc.*, 808 So.2d 798 (La. App. 1st Cir.

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[15] "A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." La. Civ. Code. art. 2056.

2002) *citing Borden, Inc. v. Howard Trucking Co., Inc.* 454 So.2d 1081, 1090 (La. 1983). The term "flood" is in the context of an exclusion and thus must be narrowly construed. "Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. *Carrier*, 759 So.2d at 43." *Cadwallader*, 848 So.2d at 580 (emphasis added); *Calogero v. Safeway Ins. Co. of La.*, 753 So.2d 170 (La. 2000). *See, generally,* 15 William McKenzie and H. Alston Johnson, III, *Louisiana Civil Law Treatise: Insurance Law and Practice* § 4 at 6-9 (2d ed. 1996).

Support for limiting this exclusion in the context of an all-risk policy is further demonstrated in the Louisiana supreme court's decision in *Doerr v. Mobil Oil Corp.*, 774 Sold 1I9 (La 2000). In *Doerr*, a refinery discharged hydrocarbons into the Mississippi River which were drawn into the St. Bernard Parish water system and then distributed to users throughout the parish. Plaintiffs in that case sought compensation from St. Bernard Parish and its insurers for personal injuries allegedly sustained from the use and/or consumption of the allegedly contaminated water. *Id.* at 121.

The Louisiana supreme court examined a total pollution exclusion endorsement in the policy and analyzed its previous decision in *Ducote v. Koch Pipeline Co.*, 730 So.2d 432 (La. 1999). In *Ducote*, the supreme court had previously held that pollution exclusions were unambiguous and excluded coverage for injury "which would not have occurred in whole or in part but for the [dispersal] of pollutants at any time." *Ducote*, 730 so.2d at432, 437. The *Doerr* court noted that this holding made it irrelevant as to who

precipitated the alleged pollution and re-examined the pollution exclusion itself.

The *Doerr* policy read:

This insurance does not apply to:

> (1) "Bodily injury", "property damage", "personal injury" or "advertising injury" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.
>
> (2) Any loss, cost or expense arising out of any:
>
> (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
>
> (b) Claim or suit by or on behalf of a governmental authority or others for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants. Pollutants means solid liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Water includes material to be recycled, reconditioned or reclaimed.

Id at 122-23. The court noted that as written:

> [T]he exclusion can be read to exclude coverage for anything from the release of chlorine gases by a conglomerate chemical plant to the release of carbon monoxide from a small business owner's

delivery truck. It could be read to exclude injuries resulting from a slip and fall on an oil-slicked beach to a slip and fall on spilled gasoline at a corner service station. As pointed out in *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992):

> without some limiting principle, the pollution exclusion clause would . . . lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, on would not ordinarily characterize these events as pollution.

Id. at 124.

The court then examined the origin of the Total Pollution Exclusion and concluded that its purpose was to exclude coverage for environment pollution with respect to the active polluter of the environment, not to apply unambiguously "regardless (as the majority stated *in Ducote*] of whether the release was intentional or accidental, a one-time event or part of an on-going pattern of pollution." *Doerr* at 126, *citing*, *Ducote*, 730 So.2d at 437. The court continued "In fact, to give the pollution exclusion the broad reading found in *Ducote* would contravene the very purpose of a CGL policy, without regard to the realities which precipitated the need for the pollution

exclusion—the federal government's war on active polluters." *Doerr* at 126. The court concluded:

> Commercial General Liability policies are purchased by both large and small business owners in an attempt to protect against losses that may result from unforeseen liability-imposing events or circumstances. As stated in Section 1(A)(1)(a) of the policy at issue here, the issuer of a liability policy "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Business owners rely on these policies to protect them against claims and losses which might otherwise force insolvency or prompt serious losses. The insurance company, on the other hand, agrees to absorb liability to which the business might otherwise be exposed in return for a premium which, along with the premiums of other insureds, is designed to adequately spread potential losses among all of the insurer's clients. These businesses come to rely on the liability policies because, without them, a single large claim might force insolvency or an, intolerable monetary loss. Consequently, business owners expect that any exclusions within their policy will be read reasonably and with due regard to the intent of the policy as a whole. Giving these pollution exclusions a strictly literal reading without regard to the limited purpose behind their post-CERCLA formation would thwart the very purpose of the comprehensive general liability policy.
>
> Both liability insurers and their insureds have certain expectations regarding issuance of a COL

> policy. The liability insurer expects premiums in exchange for a certain level of risk, and the insureds expect to be insulated generally from liability claims. A literal reading of the total pollution exclusions would alter the general scope and expectation of the parties. Consequently, because the pollution exclusion was designed to exclude coverage for environmental pollution only, it should be interpreted so that the clause "will not be applied to all contact with substances that may be classified as pollutants." Russ, *supra*, at § 127:6 n. 62 (clting *Stoney Run Co. v. Prudential-LMI Comm. Ins. Co.*, 47 F.3d 34, 37 (2nd Cir.1995)). As *Ducote* conflicts with the intent of the policy exclusion and disrupts the expectations of both insurers and insureds, that opinion will be overruled at this time.

Doerr, 774 So.2d at 127-28 (footnote omitted) (emphasis added).

Likewise, defendants' seeking to employ the broadest possible definition of "flood" in the context of the ISO Water Exclusion would result in the evisceration of what an "all-risk" policy is meant to cover. Certainly the damage sued upon was caused by flooding; but was the flooding caused by negligent acts or omissions excluded by the plain language of the policy? The insurers could have drafted such a clear exclusion with very little effort, but they did not. As discussed herein, this precise issue, natural causes versus man-made causes, has been dealt with by various courts for a number of years. If the insurers, who wrote every word of the respective policies, wanted to make the language clear, that "flood" means water damage caused by negligent acts or omissions, it could have so drafted the policy

language. For reasons only known to the insurer, it chose not to do so.

As is discussed, *infra*, in the sections concerning the State Farm policy and the Hartford policy, these insurers succeeded with very little effort in clearly excluding coverage for negligent acts or omissions. Indeed, if a consumer were to actually read the three different policy language presented in this case, one would expect that he or she would choose the ISO policy as it would be reasonable to assume that by comparison, it only excludes coverage for natural acts, unlike the other two policies. To find that the ISO language clearly excludes negligent acts would be to reward and encourage the use of vague language. This determination is underscored by the fact that the tension between natural flooding and flooding caused by negligent or intentional acts has existed for decades; obviously, some insurers made efforts to be clear in their intentions.

Furthermore, the defendant argues if the word "flood" does not include acts of negligence or omission, then the flooding which may occur as result of pumps not working in a heavy rain causing the streets to overflow with water would be covered under the policy. The Court disagrees. In that situation, the efficient proximate cause would be the natural occurrence of rain and the overflowing of the streets, not the failing of the pumps, and there would therefore would be no coverage as the cause efficient proximate cause was a natural act. What must be remembered is that the allegations in this matter revolve around the concept that the flood walls involved collapsed precisely under the conditions that they were designed to withstand. If the pumps failed

at a point which they were designed to handle, then arguably negligence might be present.

2. Existence of NFIP Does Not Change Analysis

Insurers also argue that the existence of the National Flood Insurance Program ("NFIP") demonstrates that these policies are not meant to cover flooding of any sort. The existence and scope of the NFIP has no bearing on the rules of contractual interpretation that this Court must apply as to whether an exclusion in a policy is ambiguous. Moreover, the Standard Flood Insurance Policy ("SFIP") does not purport to cover all water damage that could occur to a structure. In the SFIP under the NFIP, "Flood" is defined as follows:

> 1. A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is your property) from:
>
> a. Overflow of inland or tidal water,
>
> b. Unusual and rapid accumulation or run-off of surface waters from any source,
>
> c. Mudflow.
>
> 2. Collapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood as defined in A.1.a. above.

44 C.F.R. Ch.1 (10-1-04 Edition) Pt. 61, App. A(1). If an insurer wanted to exclude coverage for damages covered by a national insurance program, it could so state in the relevant exclusion. Furthermore, "[i]t is the reasonable interpretation of an insured that

governs the legal effect of language in an insurance contract, and not whether the language chosen by an insurer may constitute a legal term of art in another context. *Lee v. Unum Life Ins. Co. of America*, 900 So.2d 1021, 1029 (La. App. 4th Cir. 2005).

The Court also takes note that as a result of the 100 Year Flood Plane that was in effect at the time of Katrina, some lenders did not required a homeowner to purchase flood insurance where others did. Some of the predictions with respect to that flooding were apparently incorrect as a result of the alleged failure of the levee system. An insured may reasonably expect overtopping of a levee but on the other hand an insured may not reasonably expect that levees designed and certified by the United States Corps of Engineers would fail as a result of negligent design and construction as has been alleged.

3. Ensuing Loss Provisions of the Act or Decisions Exclusion Render the Exclusion Inapplicable

The insurers also contend that another exclusion would act to deny coverage to any of the instant policy holders. The policies in the Exclusion Section also provide as follows:

> Section 1—Exclusions
>
> 2. We do not insure for loss to property described in Coverages A and 5 caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.
>
> . . .
>
> b. Acts or decisions, including the failure to act or decide, of any person, group, organi-

zation or governmental body;

c. Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance; of part or all of any property whether on or off the 'residence premises."

(Standard Fire Policies, App, at Ns 97 and INS 137; Hartford Policy, App. at INS 56; Hanover Policy, app, at INS 10; Unitrin Policy, App. at INS 172.). As the Court has found there is coverage for the flood damage as alleged, then the losses would be considered "ensuing" and as such, these exclusions would be inapplicable. *See Lake Charles Harbor & Terminal District v. Imperial Cas. & Indent. Co.*, 857 F.2d 286 (5th Cir. 1988) (Rubin, J.).

As this Court. concerning *Lake Charles Harbor in Holden v. Connex-Metalna*, 2001 WL 40994 (E.D.La. Jan. 16, 2001):

> In *Lake Charles Harbor & Terminal District v. Imperial Casualty and Indemnity Company*, 670 F. Supp, 189 (W.D.La.1987), a cable broke on a shiploader, causing the shuttle portion of the loader to crash into the interior of the loader, resulting in extensive damage. The insurer denied coverage based on a policy exclusion for [m]echanical or machinery breakdown; unless an insured peril ensues, and then only for the actual

loss or damage caused by such ensuing peril." The plaintiff argued that the damage to the shiploader was an excluded peril. *Id.* at 193. It considered the that the purpose of an all risk policy "is to keep the insurer in its proper role as bearer of casualties rather than as warrantor or service contractor of the equipment of the insured. *Id* at 194. The court held that damages to the ship unloader were covered under the policy, as "[t]he damages to the ship loader were not such as the insured would be expected to bear in the ordinary course of maintenance." *Id.*

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, finding the policy language to be so ambiguous that its "words, read literally, are meaningless." *Lake Charles Harbor & Terminal District v. Imperial Casualty & Indemnity Co.*, 857 F.2d 286 (5th Cir.1988). The insurers asserted that "because a mechanical breakdown was the but for cause of the accident—no insured peril ensued." *Id.* at 287. The Court of Appeals rejected such an interpretation. Examining the policy language, Judge Rubin found that "[w]hatever ensuing peril may mean, nothing in the policies indicates that catastrophic damages to a machine caused by its own mechanical breakdown cannot be included within the term." *Id.* at 288. Thus, the court interpreted the exclusion to find that the insurance policies covered all risks except those explicitly excluded from coverage, and excluded coverage for mechanical breakdowns only when "no insured peril ensue[d] *Id.* at 289.

Id. at *5-6.

4. Anti-Concurrent Cause Clause is Inapplicable

Finally, the Court finds that the Anti-Concurrent Cause Clause[16] is inapplicable to the ISO water exclusion as there is no "separate" or other cause of damage. The allegations before the Court are not analogous to those which the Mississippi federal courts are facing in *Buente v. Allstate Ins. Co.*, 422 F. Supp.2d 690 (S.D. Miss. 2006) and *Tuepker v. State Farm Fire & Cas. Co.*, 2006 WL 1442489 (S.D. Miss. May 24, 2006). This case does not present a combination of forces that caused damage such as wind versus water as was present in the natural disaster which the Mississippi Gulf Coast experienced as a result of Hurricane Katrina. The undefined term "flood" in the Water Damage Exclusion is reasonably interpreted to be limited to flooding caused by natural acts, not those that were man-made. As such, there is no excluded loss as alleged in this Complaint. In this case the "cause" conflates to the flood; it is not wind damage versus, water damage both of which were totally naturally occurring incidents as in *Buentes*. But, there may be proof issues which will arise in the context of water damage that may have been caused by water which naturally overtopped levees. The court is not striking the anti-concurrent cause clause, it is simply holding that the term "flood" is ambiguous and that it finds that "flood" in

---

[16] This term of art is used to refer to the lead-in clause of the ISO policy which states "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. (Standard Fire Policies, App, at INS 96 and INS 136; Hartford Policy, App. at INS 55; Hanover Policy, app, at INS 9; Unitrin Policy, App. at INS 171.)

the ISO Water Exclusion context means simply "flood" caused by natural occurences such as overtopping. As previously noted, the issue of the anti-concurrent cause clause may have to addressed at a later stage of this litigation.

B. State Farm Policy's "Lead-in" Provision

The State Farm policies contain a specific lead-in which removes the ambiguity with regard to causation of flood—that is natural versus man-made. As previously noted, the State Farm policies provide:

> SECTION l—LOSSES NOT INSURED
>
> 2. We do not insure under any coverage for loss which would not have occurred in the, absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> c. (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these all whether driven by wind or not;

(Doc. 570, Exhibit A and B, pp. 7 and 10) (emphasis added).

The State Farm policy does precisely what the ISO Water Exclusion Policy fails to do. it makes it clear that regardless of the cause of the flooding, there is no coverage provided for any flooding "regardless of the cause." Such language is clear to the Court and as

such, the Court must find that the State Farm policy as written excludes coverage for all flooding.

In so finding, the Court is aware that it is at odds with the decision in *Murray*, 509 S.E.2d at 489-92. In its decision, the *Murray* court focused on the "natural or external forces" of the lead-in clause, and concluded that the lead-in clause operated to defeat the efficient proximate cause doctrine and the insureds' reasonable expectations. The court basically excused a policy holder from a "painstaking review" of the policy. *Id.* at 490. The *Murray* court relied substantially on language contained in certain California cases; however, California has statutorily limited the application of these types of clauses. As noted in David L. Leitner; Reagan W, Simpson; and John M. Bjorkman, 4 Law and Practice of Insurance Coverage Litigation § 52:35:

> Three states, California, Washington, and West Virginia, follow the efficient proximate cause rule and also refuse to enforce at least some anti-concurrent causation policy provision. In addition Wisconsin has found ambiguous and construed in favor of the insured the application of an anti-concurrent causation clause in a general policy form to an additional coverages endorsement. The California courts have concluded that anti-concurrent causation policy provisions are contrast to the statutory mandate in that state's insurance Code, In Washington, the courts simply have refused to enforce anti-concurrent causation provisions regardless of their clarity and have provided little rationale for this conclusion. West Virginia's supreme Court has concluded that the anti-concurrent cause

> language conflicts with the insured's reasonable expectations and therefore, is unenforceable.

Id. Louisiana has not spoken to the issue of whether the doctrine of efficient proximate cause overrides anti-concurrent cause clauses. As noted, Louisiana has adopted the efficient proximate cause approach to coverage; however, the courts have not, to this Court's knowledge, squarely addressed this tension. Nonetheless, from the foregoing citations to the Code and the *jurisprudence constant* concerning clear language and the ability for parties to a contract to dictate the terms thereof it appears that a Louisiana court would enforce the clear contractual intent to exclude coverage as found in this State Farm lead-in clause.

C. Hartford Policy's specific Flood Definition

Finally, in the *Vanderbrook* context, the efficacy of Hartford's "Amendatory Endorsement Specifically Excepted Perils" must be examined. This two page provision provides in relevant part:

> As used herein. Peril means a cause of physical loss or damage to property. It has this meaning whether or not it is called a Peril or a Cause of Loss in this policy.
>
> Even if any of the terms of this policy might be construed otherwise, the following Perils, as described in Paragraphs A. and B. below, are SPECIFICALLY EXCEPTED FROM THIS POLICY. WE DO NOT COVER INSURE AGAINST LOSS OR DAMAGE DIRECTLY OR INDIRECTLY CAUSED BY, RESULTING FROM, CONTRIBUTED TO OR AGGRAVATED BY, OR WHICH WOULD NOT HAVE OCCURRED BUT FOR, EITHER OF THESE PERILS:

A. ACTS, ERRORS OR OMISSIONS by you or others in:

. . .

3. The design, specifications, workmanship, repair, construction, renovation, remodeling, grading or compaction of all or any part of the following:

   b. Roads, water or gas mains, sewers, drainage ditches, levees, dams, or other facilities; . .

5. The maintenance of any of such property or facilities.

. . .

This exception A. applies whether or not the property or facilities described above are:

1. Covered under this policy; or
2. On or away from the covered premises.

This exception A. does not reduce the insurance for loss or damage caused directly by a Covered Peril.

As used in this endorsement:

1. If this policy is written to cover the risk of loss from specifically named causes, Covered Peril means any Peril specifically named as covered;
2. If written to cover the risk of toss without specifying specifically named causes, Covered Peril means any Peril not described above and not otherwise excluded or excepted from the causes of loss covered by this policy.

B. COLLAPSE CRACKING OR SHIFTING of buildings, other structures or facilities, or their parts, if the collapse, cracking or shifting:

1. Occurs during earth movement, volcanic eruption or flood conditions or within 72 hours after they cease; and

2. Would not have occurred but for earth movement, volcanic eruption, or flood.

But if loss or damage by a Covered Peril ensues at the covered premises, we will pay for that ensuing loss or damage.

This exception B. applies whether or not there are other provisions in this policy relating to collapse, cracking or shifting of buildings, other structures or facilities, or their parts. Any such provision is revised by this endorsement to include this exception.

But if this policy specifically covers (by endorsement or in any other way) loss or damage caused by one or more of the following Perils:

2. Flood:

this exception B. will not reduce that coverage,

As used in this exception B:

6. flood means:

a. Flood, surface water, waves, tides, tidal water, tidal waves, high water, and overflow of any body of water, or their spray, all whether driven by wind or not;

b. Release of water held by a dam, levy or dike or by a water or flood control device; .

All other provisions of this policy apply.

(Doc. 568, Hartford Policy, App. at INS 74-75). Hartford urges both exceptions A and B as excluding coverage for the flooding as alleged in the *Vanderbrook* petition.

The Court finds that exception A indeed acts as a specific exclusion for flood damage caused by negligently maintained levees. To begin, its "lead-in" clause leaves nothing to the imagination. It states unequivocally that "[e]ven if any of the terms of this policy might be construed otherwise," the Acts, Errors or Omission of the insured or others are specifically excepted from the policy. It continues, parsing the exclusion, to declare that Hartford specifically excludes loss or damage directly or indirectly caused by acts, errors or omissions by others in the design specifications, workmanship, repair, construction renovation, of levees, dams or other facilities or the maintenance of any such property. Such a clear statement of exclusion from coverage likewise must be enforced.

X. Conclusion

Thus, the Court finds that the ISO exclusions as contained in the Standard Fire Policies, App. at INS 94 and INS 134, the Hartford Policy, App. at INS 53, the Hanover Policy, App. at INS 7 and Unitrin Policy, App. at INS 169 are ambiguous and as such the Court finds that the motion to dismiss based on the Water Exclusion must be denied for each of these insurers except Hartford. However, because of the Amendatory Endorsement Specifically Excepted Perils, Hartford's motion will be granted. Finally,

because of the clarity of the State Farm exclusion as to "regardless of cause", that motion will be granted. Accordingly,

IT IS ORDERED that with respect to:

Doc. No, 568 the Motion for Judgment on the Pleadings filed by Hanover, Ins. Co. ("Hanover") insurer of plaintiff James Capella and Madeline Greiner[17] is DENTED.

Doc. No. 569 the Motion for Judgment on the Pleadings filed by Standard Fire Ins. Co. ("Standard') insurer of plaintiffs Peter Anthony Ascani, III; Gregory R. Jackson, and Monica Reyes is DENIED.

Doe. No. 570 the Motion for Judgment on the Pleadings filed by State Farm Fire & Gas. Co. ("State Farm) insurer of Mary Jane Silva and Robert G. Harvey is GRANTED.

Doe. No. 572 the Motion to Dismiss Party filed by Hartford Ins. Co. of the Midwest ("Hartford") insurer of Jack Capella as the Executor of the Succession of Lillian Capella is GRANTED.

Doc. No. 598 the Motion for Judgment on the Pleadings filed by Unitrim Preferred Ins. Co. ("Unitrim") insurer of Richard Vanderbrook is DENIED.

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[17] See Footnote 1 above.

THIS ORDER PERTAINS TO:
Xavier University, CA. No. 96-516

ORDER AND REASONS

Plaintiff Xavier University of Louisiana ("Xavier") was insured by Travelers Property Casualty Company of America ("Travelers") under a Commercial Insurance Policy designated as "A Custom Insurance Policy" (Exhibit A to Opposition, TRAY 383) (hereinafter TRAY) which included "Deluxe Property" coverage (TRAIT 389) as part of an all risks policy. Xavier incurred *severe* property damage some of which was allegedly was caused by water which came from the 17th Street Canal and the London Avenue Canal breaches. Relying on the following provision of the policy, Travelers has denied coverage for the water damage which Xavier experienced:

> Water Damage Exclusion
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that has contributed concurrently or in sequence to the loss.
>
> g. Water
>
> (1) Flood, surface water, waves, tides, tidal waves overflow of any body of water, or their spray, all whether driven by wind or not
>
> (2) Mudslide or mudflow:
>
> (3) Water under the ground surface pressing on, or flowing or seeping through:
>
> (a) foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

(TRAY 410). Travelers has filed Plaintiffs Motion for Partial Summary Judgment (Doc. 1217) seeking a ruling that, as a matter of law, damages to Xavier's campus following Hurricane Katrina were caused by ground water which came from the collapses of the 17th Street Canal and the London Avenue Canal levees as a result of man-made causes and that such damages are covered under the "all risks" policy of insurance issued to Xavier by defendant Travelers.

I. Standard for Summary Judgment Motion

This motion has been brought pursuant to Fed. R. Civ. P. 56. Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed, R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial," *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Substantive law determines the materiality of acts, and [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp v.*

Catrett, 477 U.S. 317, 323 (1986). Once the movant meets this burden, the burden shifts to the non-movant "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. [M]ere allegations or denials" will not defeat a well-supported motion for summary judgment Fed. R. Civ. P. 56(e). Rather, the non-movant must come forward with "specific facts" that establish an issue for trial. *Id.*

When deciding a motion for summary judgment, the Court must avoid a "trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are tasks for the trier-of-fact *Anderson*, 477 U.S. at 255. To that end, the Court must resolve disputes over material facts in the non-movant's favor. "The party opposing a motion for summary judgment, with evidence competent under Rule 56, is to be believed." *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987).

Based on the analysis contained in the *Vanderbrook* opinion herein, in particular the legal analysis contained in the following subsections:

I. The Civilian Approach as an Erie Court;

IV. Legal Concepts for Contract Interpretation;

VI. Parties' Contentions;

VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;

VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;

IX. Application of Legal Principles to the Policies Before the Court; and

> A. ISO Water Damage Exclusion, this Court finds that the Water Damage Exclusion as found in Xavier's Travelers policy is ambiguous and as such affords Xavier coverage for damages sought provided that Xavier can prove that the flooding it experienced was caused by the negligence of man. The ISO Water Damage Exclusion and the subject exclusion are practically identical; indeed, with respect to the subsection (I), the wording is identical. The exclusion does not clearly address flooding caused by man-induced causes and as such, the Court must find coverage.

This ambiguity is highlighted by the policy language itself. The Earth Movement Exclusion in the Travelers policy is preceded by the same "lead-in" clause and provides:

> b. Earth Movement
>
> (1) Any earth movement (other than "sinkhole collapse") whether natural or man made, including but not limited to earthquake, mine subsidence, landslide, or earth sinking, rising or shifting. But if earth movement results in fire, or explosion, we will pay for the loss or damage caused by that fire or explosion.

(TRAV 409). Thus, Travelers demonstrates that is has the ability to clearly exclude man-made earth-movement claims. Its failure to use the same language in the same policy with respect to an exclusion within the same section of the policy gives

further support to this Court's decision that the Water Damage Exclusion is limited to natural disasters—not those than man's negligence causes.

However, the Court cannot as a matter of law find that the damages to Xavier's campus following Hurricane Katrina were caused by ground water which came from the collapses of the 17th Street Canal and the London Avenue Canal levees. Obviously, there are questions of fact which preclude the granting of Xavier's. motion in that regard. Accordingly,

IT IS ORDERED that Plaintiffs Motion for Partial Summary Judgment (Doc. 1217) is GRANTED in part as the Court finds that the Water Damage Exclusion would provide coverage for water damage caused by the negligent acts of mind and DENIED in part as the Court finds there are material questions of fact as to the cause of the water damage to Xavier.

THIS ORDER PERTAINS TO:
Chehardy, CA. No. 06-1672, 064673, and 064674

ORDER AND REASONS

Before the Court are the following motions[18]:

Doc. 903 Motion to Dismiss filed by Louisiana Citizens Property Insurance Corp;

Doc. 923 Motion to Dismiss filed by Encompass Indemnity Company;

Doc. 932 Consolidated Rule 12(B)(6) Motion to Dismiss Plaintiffs' Amended and Restated Complaint filed by Defendants The Standard Fire Insurance Company, Lexington Insurance Company, Liberty Mutual Fire Insurance Company, The American Insurance Company, Aegis Security Insurance Company, Auto Club Family Insurance Company,[19] the Hanover Insurance Company and Lafayette Insurance Company

Doc. 936 Motion to Dismiss Plaintiffs" Amended and Restated Complaint filed by Great Northern Insurance Company;

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[18] It must be noted that the Amended and Restated Complaint does not specify which plaintiffs are insured by which defendants. The Court has attempted to ascertain this information for purposes of specificity with respect to its ensuing orders herein; however, there is some confusion which prevents the Court from doing so. In addition to which, the information provided is not in the record. However, it has been represented to the Court by counsel that all insurers herein have provided at least one policy to one plaintiff, thus the Court will enter its orders with respect to the insurers and will not be able to identify the specific plaintiff who is effected by such order.

[19] This company was named as AAA Homeowners Auto Club in the Amended Complaint.

Doc. 939 Motion to Dismiss Pursuant to Rule 12(b) filed by Allstate Insurance Company, Allstate Indemnity Company; and

Doc. 1037 Motion to Dismiss Plaintiffs' Amended and restated Complaint filed by State Farm Fire and Casualty Company.

As noted, the Court entertained oral argument on these motions on October 27, 2006 and is now prepared to rule thereon.

I. *Chehardy* Amended and Restated Complaint

Plaintiffs, as putative class representatives, allege that they are residents of the Parishes of Orleans, St. Bernard and Jefferson who sustained damage to their property following Hurricane Katrina. Plaintiffs allege that they purchased homeowners insurance from the insurers named as defendants in this case. (Doc. 516, Amended and Restated Complaint, ¶¶ 26, 27, 44).

Plaintiffs claim that they suffered water damage resulting from the "catastrophic events" of Hurricane Katrina (*Id.* ¶¶ 41-44) which left "approximately 80% of Orleans Parish . . . under water . . ." *(Id.* ¶ 45). Plaintiffs allege that, on August 29, 2005, "there was water on both sides of the Industrial Canal in New Orleans" and that "there was six to eight feet of water in the City's Lower Ninth Ward," as a result of a breach in the Industrial Canal levee wall. *(Id.* ¶¶ 41, 42). Plaintiffs further state that "the levees around the City and adjoining parishes failed in at least eight (8) distinct locations, including the 17th Street, London Avenue and Industrial Canals," and that Plaintiffs suffered damage to their property as a result of these events. (*id.* ¶¶ 43-45).

Plaintiffs allege that the cause of the levee failures was "negligent design, negligent maintenance and/or inadequate materials," and that "any damages attributable to the levee failures are the result of improper and/or negligent design, construction, maintenance of the levees by various third parties and or third party negligence." *(Id* ¶¶ 46-50). Plaintiffs also assert that high winds and storm surge contributed to levee failures and the resulting water damage to each individual plaintiff's property. *(Id* at pp. 17-18).

Plaintiffs acknowledge that their policies contain water damage exclusions that ostensibly exclude coverage for "floods" and allege that "the reasonable expectations of Louisiana policyholders is that 'flood' encompasses overflowing of the Mississippi River, accumulation of surface water due to heavy rainfalls, or similar phenomena but not the failing of virtually all man-made structures containing navigable Waters of the United States. . . . due to negligent conduct beyond " beyond plaintiffs' control. *(Id.* ¶ 61) Plaintiffs contend that these water exclusions should not be given such a broad reading so as to disallow coverage under the circumstances alleged in the Amended and Restated Complain. *(Id.* ¶ 60). They maintain that Plaintiffs' "reasonable expectation" was that their homeowners policies would provide coverage for the type of flooding that occurred after Hurricane Katrina. *(Id.)*

The Complaint alleges five counts. Count I seeks a five-part declaratory judgment from this Court. *(Id.* ¶ 58) Specifically, Plaintiffs seek a declaratory judgment that:

> (1) "The first efficient proximate cause of the Losses was 'windstorm,' a covered peril . . .

> thereby rendering any subsequent *impact from. water* released by the levee and/or levee wall failures irrelevant to coverage";
>
> (2) "The second efficient proximate cause of the losses *resulting from water entering the City of New Orleans* and adjoining parishes . . . were acts of negligence";
>
> (3) "The third efficient proximate cause of the losses *resulting from water entering the City of New Orleans* and adjoining parishes . . . was storm surge, a known meteorological phenomenon that is not specifically excluded" by the Policies;
>
> (4) "The *breaking or failure of boundaries of* lakes, reservoirs, rivers, streams, or other *bodies of water* was a peril not specifically excluded" by the Policies;
>
> (5) "The *damage caused by water* entering the City of New Orleans and adjoining parishes . . . due to the breaches in the levees and levee walls along the 17th Street Canal, London. Avenue Canal, Industrial Canal, and elsewhere neither falls within the regular definition of 'flood,' nor within any of the subject insurance policies' exclusions of 'flood.'"

(*Id.* at pp. 17-18 (emphasis added)).

Count II alleges a breach of contract claim based on the Moving Defendants' failure to pay for water damage caused by flooding allegedly resulting from the "efficient proximate cause of windstorms, storm surge and/or negligence." (*Id.* ¶ 68)

Finally, Plaintiffs also assert extra-contractual claims based on the Moving Defendants' alleged im-

proper denial of Plaintiffs' water damage claims. These claims are based on allegations that the Moving Defendants: (1) wrongfully denied coverage by "equating" losses caused by wind, negligence and storm surge "with flood" (Count 3); (2) "misrepresented" that the policies' Water Damage Exclusion applied to Plaintiffs' claims "without a legitimate basis" for doing so (Count IV); and (3) directed their adjusters to "consider only nearby waterlines and to ignore all other evidence in determining whether Policyholders' losses are covered . . ." in violation of La. R.S. 22:658.2(A)(1) (Count V). *(Id,* ¶¶ 85, 87-88, and 90; *Id.* ¶¶ 73-74 and 76-77) La. R.S. 22:658.2(A)(1), which became effective on February 23, 2006, provides that "[n]o insurer shall use the floodwater mark on a covered structure without considering other evidence, when determining whether a loss is covered or not covered under a homeowners' insurance policy."

II. Motions Filed

Based on substantially the same arguments set forth in the *Vanderbrook* matter, each of the named insureds has filed, either jointly or individually, depending on the language of their respective policies, the Motions to Dismiss noted above. In approaching these arguments, the Court re-urges and adopts herein Section I of the *Vanderbrook* opinion—that is "I. The Civilian Approach *as* an Erie Court" and "III. Standard for Judgment on the Pleadings." Furthermore, the Court will not address any arguments made with respect to the extra-contractual claims brought by plaintiffs. The Court intends to resolve the insurance coverage issues addressed in these consolidated cases and certify the matter to the United States Court of Appeals for the Fifth Circuit.

It would be premature and a distraction to approach the extra-contractual issues at this juncture. Thus, the motions in this respect will be denied without prejudice to be re-urged at the appropriate time.

The Court will now examine each motion filed, not in numerical order, but in order of scope.

III. Policy Language and the Motions to Dismiss

A. Insurers Using ISO Policy Language—Motion to Dismiss Doc. No. 932

The policies issued by The Standard Fire Insurance Company, Lexington Insurance Company, Liberty Mutual Fire Insurance Company, The American Insurance Company, Aegis Security Insurance Company, Auto Club Family Insurance Company and the Hanover Insurance Company and Lafayette-Insurance Company (hereafter "ISO defendants") are identical but for one exception. The Auto Club Family Insurance Company policy issued to Randy and Lori Gervais (INS 88 THROUGH INS 000121) does not contain the "weather conditions" and "faulty, inadequate or defective; design and maintenance exclusions, so the arguments made in that respect are not applicable to them. The Court will address the subject motion in relation to the policy provisions upon which these ISO defendants rely,

1. Water Damage Exclusion

The ISO water damage exclusion provides:

(1) We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

(c) Water Damage, meaning:

> Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these. whether or not driven by wind;

(Doc. 932 Appendix of Moving Defendants at INS 11, INS71, INS 110, INS 155, INS 199, INS 357, INS 406 AND INS 458.) Based on this language, the ISO defendants maintain that there is no coverage. For the same reasons assigned in the *Vanderbrook* opinion above, in particular,

> IV. Legal Concepts for Contract Interpretation;
>
> VI. Parties' Contentions;
>
> VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;
>
> VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;
>
> IX. Application of Legal Principles to the Policies Before the Court; and
>
> A. ISO Water Damage Exclusion,

the Court reiterates and adopts those findings and reasoning and finds this exclusion ambiguous and as such, interprets the provision in favor of the insured. Thus, the Motion to Dismiss with respect to the Water Damage Exclusion will be denied.

2. Weather Conditions Exclusion

The ISO defendants then urge that the Weather Conditions Exclusion reinforces the legal inadequacy of the plaintiffs' theory. That clause provides:

> We do not insure for loss to property described in Coverage A and B caused by any of the following. . .
>
> a. Weather conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph I, above [which includes the Water Damage Exclusion 1 to produce the loss.

(INS 0011, INS 0071, INS 00110, INS 00155, INS 00199, INS 00318, 8NS 358, INS 00406, and INS 00458). As the Court finds that the Water Damage Exclusion does not exclude coverage for water damage caused by the negligent or intentional acts of man, this provision is without force in this instance by its own terms, and the motion must be denied in this respect.

3. Negligent Design, Construction or Maintenance

The ISO defendants also urge the following language should prevent coverage from attaching:

> Section 1—Exclusions
>
> 2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.
>
> . . .

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;

c. Faulty, inadequate or defective:

(1) Planning. zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, constuction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance; of part or all of any property whether on or off the "residence premises."

(INS 0011, INS 0071, INS, 00110, INS 00155, INS 00197, INS 00318, INS 00358, INS 00406, and INS 00458) (emphasis added). As there is an ensuing loss provision in this section, again for the specific reasons stated above in Section IX.A.3. of the *Vanderbrook* opinion, the Court rejects this argument and will deny the motion.

4. Plaintiffs' Extra-Contractual Claims Fail As a Matter of Law

As stated above, the Court finds the relief sought by defendants to be premature, and the motion will be denied without prejudice for these arguments to be re-urged at the appropriate time.

Thus, the Motion to Dismiss (Doc. 932) filed by the ISO defendants will be denied.

B. Allstate Insurance Company and Allstate Indemnity Co.'s Motion to Dismiss(Doe, 939)[20]

The Court will now examine the policy language of the Allstate policies in light of its Motion to Dismiss.

1. Water Damage Exclusion

Allstate relies on the following policy language to exclude coverage for the relevant plaintiffs.

Losses We Do Not Cover Under Coverages A and B:

We do not cover loss to the property described in Coverage A—Dwelling Protection or Coverage B—Other Structures Protection consisting of or caused by:

1. Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.
2. Water or any other substance that backs up through sewers or drains.
3. Water or any other substance that overflows from a sump pump, sump pump well or other system designed for the removal of subsurface water which is drained from a foundation area of a structure.

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[20] Allstate filed a Motion for Judgment on the Pleadings in October 31, 2005, prior to this matter being transferred from the United States District Court for the Middle District of Louisiana to this Court and in reference to the Original Petition and First Supplemental and Amending Petition. Considering the filing of the Amended and Restated Complaint filed in this Court on June 2, 2006, that motion is DENIED as MOOT.

4. Water or any other substance on or below the surface of the ground, regardless of its source. This includes water or any other substance which exerts pressure on, or flows, seeps or leaks through any part of the residence premises.

(Exhibit A to Motion, ALST 00230-00231). With respect to Section 1 above, for all of the reasons stated heretofore in the *Vanderbrook* opinion above, in particular,

IV. Legal Concepts for Contract Interpretation;

VI. Parties' Contentions;

VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;

VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;

IX. Application of Legal Principles to the Policies Before the Court; and

A. ISO Water Damage Exclusion,

the Court again finds this exclusion ambiguous and as such, interprets the provision in favor of the insured. As such, the Motion to Dismiss with respect to the Water Damage Exclusion will be denied.

Likewise Losses Not Covered Sections 2, 3 and 4 above do not exclude with specificity damages caused by water the presence of which was caused by the negligent or intentional acts of man which is the gravamen of plaintiffs' claims. Obviously, in the event that there is proof adduced with respect to an individual claim that the actual cause of the damage

to that individual home was actually caused by the types of occurrences described in these exclusions, then a finder of fact could find these exclusions to be operative. However, in the context of a Motion to Dismiss, this Court cannot and will not find as a matter of law find that these exclusions are not ambiguous and clearly exclude coverage for damage allegedly caused by the failed levee system caused by the negligent or intentional acts of man.

With respect to Section 4, from the case law examined concerning this particular exclusion, it does not appear that this exclusion is meant to address water damage caused by negligence of the kind alleged in *Chehardy. See West v. Umialik Ins. Co.*, 8 P.3d 1135 (Ala. 2000); *Hudson v. Allstate ins. Co.*, 25 A.D.3d 654 (N.Y. S.Ct. App. 2nd 2006); *Carver v. Allstate Ins. Co.,* 76 S.W. 3d 901 (Ark. App. 2002), Furthermore, the term "no matter the source" does not address causation, rather it addresses the a location from where the water might emanate. As such and again for all of the reasons stated in *Vanderbrook*, the motion in this respect will be denied.

2. Planning, Construction or Maintenance

Allstate further relies on the following language which is in the same section noted above, that is the "Losses We Dot Not Cover Under Coverages A and B" which provides that it does not cover losses caused by:

> 22. Planning, Construction or Maintenance, meaning faulty. inadequate or defective:
>
> (a) planning, zoning, development. Surveying, siting;

(b) design, specifications, workmanship. Repair construction, renovation, remodeling, grading, compaction;

(c) material used in repair, construction, renovation or remodeling; or

(d) maintenance;

of property whether on or off the residence premises by any person or organization.

(Exhibit A to Motion, ALST 00232). Again, this exclusion does not clearly exclude man-made failures with respect to levees which is at the core of the *Chehardy* pleading. Although the Allstate provision does not have an ensuing loss provision like the one contained in the ISO policy, this exclusion would appear to apply only to defalcations which occur whether on or off the residence premises with respect to the construction or design, and the like, of the insured premises or for property insured but not on the insured premises. Therefore, the omission of the ensuing loss provision is irrelevant to the facts as plead herein. *See e.g. Holland Breaux*, 2005 WL 3542899 (E.D.La. Nov. 22, 2005) (Africk, J.); *Angott v. Great Northern Ins. Co.*, 2006 WL 1328874 (RD. Mich. May 15, 2006); *Wright v. Safeco Ins. Co. of America*, 2004 WI. 2095664 (Wash. App. Div. 1 Sept. 1, 2004). Again for all of the reasons cited with respect to what is required for an exclusion to an all-risk policy to be unambiguous and enforceable found in *Vanderbrook*, this exclusion fails.

3. Storm Surge in Section 1 of Exclusion for Flood

Allstate also reiterates the language contained in Section 1[21] of the losses not covered and cites to *Tuepker v. State Farm*, 2006 WL 1442489 (S.D. Miss. May 24, 2006) to urge that because "storm surge" was clearly excluded, there should be no coverage. This case is inapposite to the one before the Court because in *Tuepker*, naturally occurring storm surge was the cause of loss along the Mississippi Gulf Coast. There was no levee failure involved; this argument is irrelevant to the *Chehardy* allegations.

4. Weather Conditions

Allstate also relies on Exclusion Section 21 which provides that Allstate does not cover loss to the insured property caused by "weather conditions that contribute in any way with a cause of loss excluded in this section to produce a loss." (Exhibit A, ALST 00232). Again, as the Court has found that the Water Damage Exclusions are inapplicable, this exclusion has no effect as the loss is not excluded by the "Losses We Do Not Cover" provisions.

5. Hurricane Deductible Endorsement

Allstate argues in its opposition to the *Chehardy* motion, "Plaintiffs also have argued that their homeowner policy covers flood damage because of a Hurricane Deductible Endorsement." While this allegation in the *Chehardy* pleadings alludes the Court, the Court concurs that any Hurricane Deductible Endorsement contained in a policy does

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[21] "Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind."

not increase coverage provided to a homeowner or insured. Rather it generally increases the applicable deductible for covered losses caused by a hurricane. As such, the Court finds that such an endorsement does not increase the coverage conferred by the policy in question.

6. Plaintiffs' Extra-Contractual Claims Fail As a Matter of Law

As stated above, the Court finds the relief sought by Allstate to be premature considering the posture of the case, and the motion will be denied without prejudice for it to be re-urged at the appropriate time.

Thus, Allstate Insurance Company and Allstate Indemnity Co.'s Motion to Dismiss (Doc. 939) will be denied.

C. State Farm's Motion to Dismiss (Doc. 1037)

State Farm moves for the dismissal of Count One of the Complaint for Declaratory Relief and Count Two for Breach of Contract based on the same exclusions previously discussed in the *Vanderbrook* opinion.

The State Farm policies provide that "We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I—LOSSES NOT INSURED." The policies then provides:

> SECTION I—LOSSES INSURED
>
> Coverage A-Dwelling
>
> We insure for accidental direct physical loss to the property described in Coverage A, except as provided in Section I—LOSSES NO INSURED.

SECTION I—LOSSES NOT INSURED

2. We do not insure under any coverage for loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss *regardless of: (a) the cause of the excluded event*; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

c. (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these all whether driven by wind or not

(Doc, 570, Exhibit A and B, pp. 7 and 10) (emphasis added).

For the reasons previously assigned in *Vanderbrook,* in particular Section's:

IV. Legal Concepts for Contract Interpretation;

VI. Parties' Contentions;

VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;

VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;

IX. Application of Legal Principles to the Policies Before the Court; and

A. ISO Water Damage Exclusion and

B. State Farm Policy's "lead-In Provision,

State Farm's Motion to Dismiss (Doc. 1037) will be granted and Counts One and Two of the *Chehardy* Amended and Restated Complaint will be dismissed as to State Farm: This provision clearly excludes flood damage "no matter the cause" which clearly includes both natural and man-made "causes." As previously stated, the Court will not address the extra-contractual relief sought at this time, and the motion will be denied in that respect without prejudice, to be re-urged at the appropriate time.

D. Louisiana Citizens Property Insurance Corp.—Motion to Dismiss Doc. 903

Louisiana Citizens Property Insurance Corporation ("LCPIC") filed a motion which adopts the memoranda filed by the ISO defendants, State Farm and Allstate. This defendant did not explain or provide the Court with which provisions of its own policy upon which it relies in order to ride on these memoranda's coattails. From a review of the insurance policy,, it appears that it tracks the language of the ISO defendants' policy—in particular the Water Damage Exclusions, the Weather Condition Exclusion and the Faulty, Inadequate or Defective Acts Exclusion. As such, for the reasons stated in *Vanderbrook* and the reasons reiterated above with respect to the ISO defendants' policy, LCPIC's Motion to Dismiss (Doc. 903) will be denied.

E. Encompass Indemnity Company's Motion to Dismiss (Doc. 923)

Encompass Indemnity Company ("Encompass") filed its Motion to Dismiss; and Incorporated Memorandum and adopted (I) Allstate's arguments, (2) the ISO defendants' arguments as well (3) State Farms' arguments. In its memorandum, this defendant does

not specify what language within the Encompass policy upon which it relies in this instance. It would appear that the policy tracks the Allstate policy in some regards as well as the ISO defendants' policies. As best as this Court can ascertain, Encompass relies on the following language:

1. Water Damage Exclusion

In a section entitled "LOSSES WE DO NOT COVER" at ALST 00176 of Exhibit A to the subject motion it states:

> We do not insure for loss caused directly or indirectly by any of the following_ such loss is excluded regardless of any other cause or event contributing concurrently or n any sequence to the loss.
>
> 1. Real Property and Tangible Personal Property. We do not insure for loss:
>
> a. caused by water damage. meaning:
>
> 1. Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind;
>
> 2. Water which backs up through sewers or drains;
>
> 3. Water below the surface of the ground including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure; or
>
> 4. Water emanating from a sump pump, sump pump well or similar device

> designed to prevent overflow, seepage or leakage of subsurface water.
>
> Direct loss by fire explosion or theft resulting from water damage is covered.

ALST 00177. This water exclusion has neither the lead-in language of State Faun's policy nor the same wording as that of the Allstate policy. It is most like the ISO policy and for all the reasons stated in the foregoing *Vanderbrook* and the *Chehardy* opinion to this point, the Court will deny the motion to dismiss as it pertains to the applicability of the Water Damage Exclusion. Only Section 1 would be arguably applicable by operation of the facts in the instant matter, and the reasons given for the denial of the ISO provisions with respect to the Water Damage Exclusion operate equally in this instance.

2. Other Exclusions

The other provisions that would apparently mirror the arguments made in the other briefs noted are found at Section 2. of the LOSSES WE DO NOT COVER portion of the pol'cy which states:

> 2. Real Property. We do not insure for loss:
>
> g. To covered real property caused by any of the following. *However, any ensuing loss not excluded or excepted in this policy is covered.*
>
> (1) Weather conditions. However, this exclusion applies only if weather conditions contribute in any way with a cause on (sic) event otherwise excluded to produce the loss.

(2) Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

(3) Faulty, inadequate or defective:

(a) Planning, zoning, development, surveying, siting;

(b) Design, specifications, workmanship. repair, construction, renovation, remodeling, grading, compaction;

(c) materials used in repair, construction, renovation or remodeling; or

(d) Maintenance;

of part or all of any property whether on or off your residence premises.

(ALST 00178-79)(emphasis added). Considering the ensuing loss provision above, the Court likewise for all of the reasons stated previously finds that these exclusions do not operate to exclude coverage for the damages sought in *Chehardy* with respect to losses from water damage.

Again, the Court will deny the motion insofar as it seeks any dismissal of any extracontractual issues as premature. Thus, the Encompass Indemnity Company's Motion to Dismiss (Doc. 923) will be denied.

F. Great Northern Insurance Company's Motion to Dismiss (Doc. 936)

Great Northern adopted the Motion to Dismiss of Allstate and relies on the following specific policy language contained in its policy as concerns its

argument with respect to the Water Damage Exclusion:

> EXCLUSIONS
>
> These exclusion apply to your Deluxe House Coverage. including the Extra Coverages. unless stated otherwise.
>
> The words "caused by' mean any loss that is contributed to, made worse by, or in any way results from that peril.
>
> . . .
>
> Surface water. We do not cover any loss caused by:
>
> - flood, surface water, waves, tidal water, or water borne material from any of these;
> - overflow of water or water borne material from a body of water;
> - run off of water or water borne material from a paved surface, driveway, walkway, patio, or other similar surface; or
> - spray from any of these,
>
> from any source, even if driven by wind. But we do insure ensuing covered loss unless another exclusion applies.

(Exhibit A, CH-FOR-020 and Exhibit B CH-BAR-018.) This exclusion again does not clearly exclude water damage caused by negligent or intentional acts of man. It does not address the ambiguity of the term "flood" and the fact that all of the listed "causes" appear to be the result of natural occurences, not the monumental civil engineering debacle that is alleged by plaintiffs. For the reasons assigned in *Vander-*

brook and in the previous sections dealing with ISO and Allstate's motions in *Chehardy,* the Court fords that the Motion to Dismiss based on this exclusion is without merit.

As to the Faulty Planning, Construction or Maintenance, the following language appears in the same Exclusion section as above:

> These exclusion apply to your Deluxe House Coverage, including the Extra Coverages. unless stated otherwise.
>
> The words "caused by" mean any loss that is contributed to, made worse by, or in anyway results from that peril.
>
> . . .
>
> Faulty planning, construction or maintenance. We do not cover any loss caused by the faulty acts, errors or omissions of you or any other person in planning, construction or maintenance. it does not matter whether the faulty acts, errors or omissions take place on or off the insured property. *But we do insure ensuing covered loss unless anther exclusion applies.* "Planning' includes zoning, placing, surveying, designing, compacting, setting specifications, developing property and establishing building codes or construction standards. "Construction' includes materials, workmanship, and parts or equipment used for construction or repair.

(Exhibit A, CH-FOR-021 and Exhibit B CH-BAR-019.) (emphasis added). Again, for all the reasons previously assigned in *Vanderbrook* and *Chehardy* with respect to this exclusion, as the damage would be considered loss from a covered peril based on the

previous analysis, this provision does not operate to deny the insureds coverage.

Likewise, all other arguments raised as to "windstorm," "storm surge" and the applicability of the anti-concurrent clause are likewise rejected for the reasons stated heretofore in *Vanderbrook*. Finally, as noted, the Court will deny the motion insofar as it seeks the dismissal of the extra-contractual claims. The Court will deny that portion of the Motion to Dismiss without prejudice for it to be re-urged at the appropriate time. Thus, the Great Northern Insurance Company's Motion to Dismiss (Doc. 936) will be denied. Accordingly,

IT IS ORDERED with respect to:

Doc. 903 the Motion to Dismiss filed by Louisiana Citizens Property Insurance Corp is DENIED.

Doc. 923 the Motion to Dismiss filed by Encompass Indemnity Company is DENIED.

Doc. 932 Consolidated Rule 12(B)(6) Motion to Dismiss Plaintiffs' Amended and Re-stated Complaint filed by Defendants The Standard Fire Insurance Company, Lexington Insurance Company, Liberty Mutual Fire Insurance Company, The :American Insurance Company, Aegis Security Insurance Company, Auto Club Family Insurance Company,[22] the Han= over Insurance Company and Lafayette Insurance Company is DENIED.

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[22] This company was named as AAA Homeowners Auto Club in the Amended Complaint.

Doc. 936 Motion to Dismiss Plaintiff's Amended and Restated Complaint filed by Great Northern Insurance Company is DENIED.

Doc. 939 Motion to Dismiss Pursuant to Rule 12(b) filed by Allstate Insurance Company, Allstate Indemnity Company is DENIED.

Doc. 1037 Motion to Dismiss Plaintiffs' Amended and restated Complaint filed by State Farm Fire and Casualty Company is GRANTED with respect to coverage and DENIED in part, that is with respect to the extra-contractual claims of plaintiffs.

THIS ORDER PERTAINS TO:

CIVIL ACTION NO. 06-0169
SECTION K(2)

KELLY A. HUMPHREYS,

VERSUS

ENCOMPASS INSURANCE COMPANY, ET AL.

ORDER AND REASONS

Kelly A. Humphreys ("Humphreys") filed a Motion for Partial Summary Judgment seeking coverage for wind and flood damages caused by Hurricane Katrina_ (Doc. 39). Having held, oral argument on this matter on October 27, 2006, and having reviewed the pleadings, exhibits, memoranda and the relevant law, the Court will rule in conformity with the prior decisions rendered herein in the *in re Katrina Canal Breaches Consolidated Litigation* with respect to *Vanderbrook Xavier and Chehardy*. The Court adopts and considers this motion in conformity with Section 1 of the *Vanderbrook* opinion entitled "The Civilian Approach as an *Erie* Court" and Section 1 of the *Xavier* opinion entitled "Standard for Summary Judgment Motion." The Court will *first* review the pleadings herein.

I. Procedural History and Allegations of Petition

The petition was initially filed in Civil District Court for Parish of Orleans and after the Orleans Levee District was added, the suit was removed to the United States District Court for the Eastern District of Louisiana on January 13, 2006. It was eventually transferred to this section of Court, where

the Court granted a Motion to Sever the Orleans Levee District from this matter and remanded that party to state court leaving only Encompass as a litigant.

Plaintiff alleges that her property suffered damage as a result of the 17th Street Canal levee breach. (Petition at IX-XL) Plaintiff purchased from Encompass a homeowner's policy of insurance in which the summary notes that plaintiff paid an additional $409.00 for "Hurricane Peril Coverage." The declaration sheet notes a $1000.00 "Hurricane Deductible." Plaintiff sought damages under this policy for water damage, wind damage, bad faith claims, including but not limited to her claims under La. R.S. 22:658 and 22:1220. Humphreys also had purchased National flood Insurance Program ("NFIP") coverage from which she collected and is not the subject of suit. On June 12, 2006, a Rule 41 Stipulation of Partial Dismissal was filed notifying the Court that all of plaintiff's wind damage claims and her bad faith claims, including but not limited to her claims under La. R.S. 22:658 and 22:1220 had been compromised. Thus, the only issue remaining is whether her homeowners policy provides coverage for the water damage which she experienced as the result of the collapse of the 17th Street Canal floodwall.

II. The Motion Before the Court

The thrust of plaintiffs motion focuses on the Hurricane Deductible Endorsement which she maintains takes precedence over policy language pursuant to La. Rev. Stat. 22:654 and the declaration sheet

which states "Hurricane Coverage Peril." Plaintiff maintains that:

1. By virtue of the Hurricane Peril Coverage/Hurricane Deductible endorsement," a hurricane is covered event.
2. Flood and wind is characteristic of a hurricane storm event;
3. Plaintiff has coverage for "windstorm," so why then did she purchase hurricane protection coverage; and
4. Section 2. Real Property subsection g and g.(1) excludes weather conditions but states "ensuing loss," not excluded or exempted by tin the policy is covered.

As such, plaintiff contends that the ensuing loss, damage caused by Windstorm and Hurricane Peril Coverage and Hurricane Deductible Endorsement are ensuing losses that extended coverage by virtue of the endorsements to provide coverage for otherwise excluded perils, i.e. wind and flood waters caused by a hurricane. In addition, plaintiff contends that these provisions create an ambiguity of the type noted in *Tuepker, supra*, and as such, a finding of coverage should ensue.

At oral argument, counsel for plaintiff also adopted the arguments of other counsel concerning the applicability of the Water Damage Exclusion.

III. Applicable Policy Provisions

The policy states in relevant part the following:

> COVERAGES
>
> $1000 Hurricane Deductible (based on the residence value)

B. HURRICANE DEDUCTIBLE ENDORSEMENT

We will pay only that part, of the total of the loss for all Property Coverages that exceeds the hurricane deducible state on the Coverage Summary. The hurricane deductible shown on the Coverage Summary applies to all covered property for direct physical loss or damage caused directly or indirectly by a hurricane as defined below. Such deductible applies regardless of any other cause or event contributing concurrently or in any sequence to the loss. No other deducible provision in the policy applies to direct physical loss caused by a hurricane. in no event will the deductible applied for a hurricane loss be less than the property deductible shown on the Coverage Summary.

Hurricane means wind, wind gust, hail, rain. tornado, cyclone or hurricane which result in direct physical loss or damage to property be a storm system that has been declared to be hurricane by the National Weather Service. the duration of the hurricane includes the time period in your state:

A. beginning at the time a hurricane watch or hurricane warning is issued for any part of the state by the National Weather Service;

B. continuing for the time period during which the hurricane conditions exist anywhere in the state; and

C. ending 12 hours following the termination of the last hurricane watch or hurricane warning for any part of your state by the National Weather serve.

All other provisions of this policy apply.

REAL PROPERTY COVERED PERILS

We cover direct physical loss to property describe in Real Property - Insuring Agreement, unless the loss is not covered under Property Coverage - Losses We Do Not Cover.

. . .

LOSSES WE DO NOT COVER

The introductory paragraph is deleted and replaced by the following:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. However, coverage will be provided for any covered peril that precedes an excluded peril, occurs concurrently with an excluded peril, or occurs as a result of an excluded peril.

(Exhibit "1E" amendment of G18733-H Required Coverage and amendments page 6 of 14.)

1. Real property and Tangible Personal Property. We do not insure for loss:

   a. Caused by water damage, meaning:

      (1) Flood, surface water, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(Exhibit "IF" policy of Insurances page 11 of 23).

2, Real Property. We do not insure for toss:

   g. To covered real property caused by any of the following. However, any ensuing loss not excluded or excepted in this policy is covered.

(1) Weather conditions. However, this ex clusion applies only if weather conditions contribute in any way with a cause on (sic) event otherwise excluded to produce the loss.

(Exhibit 1G, Page 13 of 23 of policy).

III. Analysis

Plaintiff's contentions concerning the Hurricane Deductible are misplaced. This endorsement simply reduced the deductible that would normally be applicable from a percentage of the value of the house to a flat $1000.00. It does not create independent coverage. However, because of the ambiguity in the Water Damage. Exclusion as. previously discussed in *Vanderbrook, Xavier and Chehardy*, the Court finds it will grant the motion for partial summary judgment as the Water Damage Exclusion is ambiguous and must be construed against the insurer, and thus provides coverage for the insured herein. In so finding the Court reiterates and incorporates the *Vanderbrook* opinion above, in particular sections,

IV. Legal Concepts for Contract Interpretation;

VI. Parties' Contentions;

VII. Definitions and Usage of the Word "Flood" Demonstrate Two Reasonable Interpretations of the Term;

VIII. Jurisprudence Further Demonstrates Reasonableness of Alternative Interpretations;

IX. Application of Legal Principles to the Policies Before the Court; and

A. ISO Water Damage Exclusion.

Accordingly,

IT IS ORDERED that the Plaintiff's Motion for Partial Summary Judgment is GRANTED insofar as there is coverage as a result of the ambiguity in the Water Damage Exclusion and DENIED with respect to the Hurricane Deductible argument.

CERTIFICATION FOR APPEAL

Pursuant to 28 U.S.C. § 1292(b), all orders entered herein involve a controlling question of law as to which there is a substantial ground for a difference of opinion and an immediate appeal from these orders may materially advance the ultimate termination of the litigation. In accordance with 28 U.S.C. § 1292(b), an application for appeal must be made to the Court of Appeals within ten days after the entry of this order.

The Court notes that if it had the power under Rule XII of the Rules of the Louisiana Supreme Court to certify the issues decided herein to that court, it would have done so, since there are no clear controlling precedents of the Louisiana Supreme Court on same and the issues presented and decided herein are significant and require an application of Louisiana law.

New Orleans, Louisiana, this 27th day of November, 2006.

/s/ Stanwood R. Duval, Jr.
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT COURT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 2, 2007]

No. 07-30119

IN RE: KATRINA CANAL
BREACHES LITIGATION

RICHARD VANDERBROOK; MARY JANE SILVA; JAMES CAPELLA; MADELINE GRENIER, misidentified as Sophia Grapier; JACK CAPELLA, as the Executor of the Succession of Lilian Capella; GREGORY JACKSON; PETER ASCANI, III; ROBERT G HARVEY, SR.
Plaintiffs - Appellees - Cross-Appellants,

v.

UNITRIN PREFERRED INSURANCE COMPANY;
HANOVER INSURANCE COMPANY;
STANDARD FIRE INSURANCE COMPANY,
Defendants – Appellants,

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant - Cross-Appellee.

KELLY A HUMPHREYS,
Plaintiff - Appellee - Cross-Appellant,

v.

ENCOMPASS INDEMNITY COMPANY,
Defendant - Appellant - Cross-Appellee.

XAVIER UNIVERSITY OF LOUISIANA,
Plaintiff – Appellee,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,
Defendant – Appellant.

GLADYS CHEHARDY; DANIEL FONTANEZ; JACQUELYN FONTANEZ; LARRY FORSTER; GLENDY FORSTER; *et al.*,
Plaintiffs - Appellees - Cross-Appellants,

v.

ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; AMERICAN INSURANCE COMPANY; AEGIS SECURITY INSURANCE COMPANY; LAFAYETTE INSURANCE COMPANY; LIBERTY MUTUAL FIRE INSURANCE COMPANY; AAA HOMEOWNERS AUTO CLUB FAMILY INSURANCE COMPANY; LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION; LEXINGTON INSURANCE COMPANY; ENCOMPASS INSURANCE COMPANY OF AMERICA; GREAT NORTHERN INSURANCE COMPANY; HANOVER INSURANCE COMPANY; STANDARD FIRE INSURANCE COMPANY,
Defendants – Appellants,

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant - Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana, New Orleans

Before KING, DeMOSS, and OWEN, *Circuit Judges.*

KING, *Circuit Judge*:

On the morning of August 29, 2005, Hurricane Katrina struck along the coast of the Gulf of Mexico, devastating portions of Louisiana and Mississippi. In the City of New Orleans, some of the most significant damage occurred when levees along three major canals the 17th Street Canal, the Industrial Canal, and the London Avenue Canal—ruptured, permitting water from the flooded canals to inundate the city. At one point in Katrina's aftermath, approximately eighty percent of the city was submerged in water.

Each plaintiff in this case is a policyholder with homeowners, renters, or commercial-property insurance whose property was damaged during the New Orleans flooding. Despite exclusions in their policies providing that damage caused by "flood" is not covered, the plaintiffs seek recovery of their losses from their insurers. Their primary contention is that the massive inundation of water into the city was the result of the negligent design, construction, and maintenance of the levees and that the policies' flood exclusions in this context are ambiguous because they do not clearly exclude coverage for an inundation of water induced by negligence. The plaintiffs maintain that because their policies are ambiguous, we must construe them in their favor to effect coverage for their losses.

We conclude, however, that even if the plaintiffs can prove that the levees were negligently designed, constructed, or maintained and that the breaches were due to this negligence, the flood exclusions in the plaintiffs' policies unambiguously preclude their recovery. Regardless of what caused the failure of the flood-control structures that were put in place to prevent such a catastrophe, their failure resulted in a widespread flood that damaged the plaintiffs' prop-

erty. This event was excluded from coverage under the plaintiffs' insurance policies, and under Louisiana law, we are bound to enforce the unambiguous terms of their insurance contracts as written. Accordingly, we conclude that the plaintiffs are not entitled to recover under their policies.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The cases in this appeal are a handful of the more than forty currently pending cases related to Hurricane Katrina that have been consolidated for pretrial purposes in the Eastern District of Louisiana. In several of the consolidated cases, property owners are suing their insurers to obtain recovery under homeowners, renters, and commercial-property policies for the damage their property sustained during the inundation of water into the city that accompanied the hurricane. This appeal involves four such cases: *Richard Vanderbrook et al. v. Unitrin Preferred Insurance Company et al.* ("the *Vanderbrook* action"), *Xavier University of Louisiana v. Travelers Property Casualty Company of America* ("the Xavier action"), *Gladys Chehardy et al. v. State Farm Fire & Casualty Company et al.* ("the *Chehardy* action"), and *Kelly A. Humphreys v. Encompass Indemnity Company* ("the *Humphreys* action")[1] The detailed factual and procedural background of each of these cases follows.

A. The *Vanderbrook* Action

In the *Vanderbrook* action, eight individuals ("the *Vanderbrook* plaintiffs") filed a petition for damages

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[1] The *Humphreys* action was initially consolidated with the remaining cases, but on Encompass Indemnity Company's motion, the district court severed it from the consolidated case.

in Louisiana state court against their insurers.[2] The *Vanderbrook* plaintiffs allege that "[s]ometime between 10:00 and 11:00 a.m. on August 29, 2005, before the full force of [Hurricane Katrina] reached the City of New Orleans, a small section of the concrete outfall canal wall known as the 17th Street Canal, suddenly broke, causing water to enter the streets of the [c]ity," resulting in damage to their insured property. They assert that the water damage "was not the result of flood, surface water, waves, [tidal] water, tsunami, seiche, overflow of a body of water, seepage under or over the outfall canal wall or spray from any of the above but was water intrusion, caused simply from a broken levee wall."

The *Vanderbrook* plaintiffs allege that their insurers have refused to adjust or pay for their losses, despite "a sudden break in the concrete wall of the levee outfall canal" not being described in any of their policies as an excluded loss. They assert that their insurance policies are contracts of adhesion and are "unduly and unreasonably complex," resulting in their lack of understanding of the policies' provisions. And they allege that the policies' exclusions are so "oppressive" to them and "unreasonably favorable" to the insurers that the exclusions are unconscionable and void. The *Vanderbrook* plaintiffs seek compensatory damages, additional damages for the insurers' arbitrary and capricious conduct, interest, expert fees, and attorney's fees.

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[2] The *Vanderbrook* plaintiffs also sued the Board of Commissioners for the Orleans Levee District for the Parish of Orleans, but the claim against that defendant is not at issue in this appeal.

Plaintiffs-appellees James Capella and Madeline Grenier were insured through defendant-appellant Hanover Insurance Company ("Hanover"), plaintiffs-appellees Peter Ascani III and Gregory Jackson were insured through defendant-appellant Standard Fire Insurance Company ("Standard Fire"), and plaintiff-appellee Richard Vanderbrook was insured through defendant-appellant Unitrin Preferred Insurance Company ("Unitrin"). The Hanover,[3] Standard Fire, and Unitrin policies provide coverage for risk of direct physical loss to structures on the property as well as for certain risks of loss to personal property, as long as the loss is not an excluded peril. The policies contain the following flood exclusion:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . . .
>
> . . . Water Damage, meaning:
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> > . . . Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind . . .

Plaintiffs-cross-appellants Mary Jane Silva and Robert G. Harvey Sr. were insured through defen-

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[3] At oral argument before the district court, a copy of Madeline Grenier's policy with Hanover that contains only the odd-numbered pages was inserted into the record. Because the copy of the policy in the record is incomplete, we cannot adequately review it. Consequently, we leave it to the district court on remand to obtain a copy of the entire policy and to interpret it consistently with this opinion.

dant-cross-appellee State Farm Fire and Casualty Company ("State Farm"). The State Farm policies insured against loss to the dwelling and for certain losses to personal property except as excluded by the policy. The policies contained the following flood exclusion:

> We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:
>
> . . .
>
> . . . Water Damage, meaning:
>
> (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, all whether driven by wind or not . . .

The *Vanderbrook* action was removed to federal court on the basis of diversity jurisdiction. Hanover, Standard Fire, Unitrin, and State Farm filed Rule 12(c) motions for judgment on the pleadings, contending that the *Vanderbrook* plaintiffs' losses were excluded under their respective policies. In a single eighty-five-page order issued on November 27, 2006, the district court addressed the availability of coverage under the policies at issue in all four cases in this appeal, first addressing the *Vanderbrook* action. With

respect to Hanover, Standard Fire, and Unitrin, the district court denied their motions and ruled that the plaintiffs' policies insured them against loss from water damage resulting from levee breaches where the breaches were induced by negligence. The court determined that the policies' flood exclusions were ambiguous because the term "flood" was susceptible to two reasonable definitions: one that relates to floods resulting from natural causes only and one that relates to floods resulting from both natural causes and negligent or intentional acts.

The district court reached this conclusion based on several sources. First, the court discussed dictionary definitions of the term "flood" and opined that the definitions contemplated a natural event caused by rain or tide. Second, the court looked to cases interpreting "water damage" exclusions in the context of ruptured water mains, as well as "earth movement" exclusions, wherein courts have applied a distinction between naturally and non-naturally occurring events. Finally, the court considered but rejected cases that interpreted flood exclusions as extending to inundations of water caused by the rupture of a dam or dike.

Having concluded that the term "flood" as used in the exclusions was ambiguous, the district court construed the Hanover, Standard Fire, and Unitrin policies in the insureds' favor and concluded that the policies covered water damage caused by a ruptured levee where the rupture was due to the levee's inadequate design, construction, or maintenance. Because the plaintiffs alleged that the post-Katrina inundation of water into the City of New Orleans was caused by negligent design, construction, and maintenance of the levees alongside the city's canals, the

court decided that if the plaintiffs could prove their allegations, they could prevail. Accordingly, the district court denied Hanover's, Standard Fire's, and Unitrin's motions.

With respect to State Farm's policies, however, the district court concluded that the flood exclusion's "lead-in" clause removed any ambiguity and clearly excluded coverage for all floods, whether natural or not. The "lead-in" language on which the district court relied provides in part: "We do not insure for such loss [i.e., loss resulting from flood] regardless of . . . the cause of the excluded event[] or . . . whether the event . . . arises from natural or external forces." The court granted State Farm's motions and dismissed the actions against it.

B. The *Xavier* Action

Plaintiff-appellee Xavier University of Louisiana ("Xavier") filed suit against its insurer, defendant-appellant Travelers Property Casualty Company of America ("Travelers"), in federal court on the basis of diversity jurisdiction. In its complaint, Xavier alleged that Hurricane Katrina caused in excess of $30 million in damage to insured structures on its campus. The complaint itself does not allege how the damage was caused—i.e., by water inundation from failed levees or otherwise. Xavier avers that it has filed a claim with Travelers and that despite lengthy communication, the insurer has failed to pay for the damage to Xavier's campus. Xavier brings claims for breach of contract and for violations of various provisions of Title 22 of the Louisiana Revised Statutes, seeking compensatory damages, attorney's fees, and statutory penalties.

Xavier's commercial policy with Travelers provided coverage for direct physical loss to buildings and personal property, subject to policy limitations and exclusions. The policy contained the following flood exclusion:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> . . . .
>
> . . . Water
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> . . . Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not . . . .

Xavier filed a motion for partial summary judgment, seeking a ruling that as a matter of law (1) the damage to Xavier's campus was "caused by ground water which came from the collapses of the 17th Street Canal and the London Avenue Canal levees as a result of man-made causes" and (2) such damage was covered under Xavier's policy with Travelers. The district court granted the motion in part and denied it in part. For the same reasons that the court denied Hanover's, Unitrin's, and Standard Fire's motions in the *Vanderbrook* action, the court granted partial summary judgment in Xavier's favor on the second issue, determining that water damage resulting from a failed levee due to negligence would be covered under the insurance policy. But the court denied Xavier's partial-summary-judgment motion on the question whether the damage to the campus was in fact caused by the collapses of the levees, con-

cluding that there were material questions of fact as to the cause of Xavier's water damage.

C. The *Chehardy* Action

In the *Chehardy* action, a group of thirty individuals and one corporation ("the *Chehardy* plaintiffs")[4] allege that their real and personal property was damaged or destroyed by the inundation of water into the City of New Orleans that followed Hurricane Katrina. They bring a putative class action[5] against their insurers, asserting that their losses were covered by their respective insurance policies.

The defendants in the *Chehardy* action are thirteen insurance companies. Among them is a group of insurers hereinafter called "the ISO Defendants," so

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[4] The *Chehardy* plaintiffs comprise plaintiffs-appellees-cross-appellants Gladys Chehardy; Daniel and Jacquelyn Fontanez; Larry and Glendy Forster; Kenneth and Judy Maier; Randy and Lori Gervais; Andre and Marlin Mauberret; Debbie and Dave Strawn; Stephanie and Brad .Boyd; New Orleans Flooring Supply, Inc.; Shawn and Angelina Burst; Patricia Brown; Marie Fatheree; Katrina Daniels; Lionel and Edna Jones; Karen Lewis; Shane Sylvester; Austra Zapata; Sabrina Perkins; Eldridge Pollard; Michael Peterson; Wendell Glation; and Mack Barham.

[5] The amended complaint defines the class of policyholders as

> all owners in the Parishes of Orleans, St. Bernard, and Jefferson, State of Louisiana, who own immovable property with improvements, principally houses or related residential structures, as well as personal property located there, which was destroyed or damaged by winds generated by Hurricane Katrina in excess of their respective policy deductibles and not reimbursed by their insurance companies, but excluding members of the judiciary, their administrative staff and any other personnel who may cause a member of the Louisiana bench to be unable to preside over this action.

named because these insurers used policy forms provided by Insurance Services Office, Inc. The ISO Defendants are defendants-appellants Lafayette Insurance Company ("Lafayette"), Liberty Mutual Fire Insurance Company ("Liberty Mutual"), American Insurance Company ("American"), Auto Club Family Insurance Company ("Auto Club"), Standard Fire, Lexington Insurance Company ("Lexington"), Aegis Security Insurance Company ("Aegis"), and Hanover. The remaining *Chehardy* defendants are defendants-appellants Allstate Indemnity Company and Allstate Insurance Company (collectively, "Allstate"), Louisiana Citizens Property Insurance Corporation ("Louisiana Citizens"), Encompass Insurance Company of America ("Encompass Insurance"), and Great Northern Insurance Company ("Great Northern"), as well as defendant-cross-appellee State Farm.

In their amended complaint, the *Chehardy* plaintiffs allege that after Hurricane Katrina made landfall on August 29, 2005, the New Orleans-area levee system was breached in at least eight places, causing water to be released into the city and adjoining parishes. According to the amended complaint, by 9:00 a.m. on August 29, approximately three hours after the hurricane's landfall, there was six to eight feet of water in the Lower Ninth Ward area of New Orleans, and approximately eighty percent of Orleans Parish ultimately became submerged. The plaintiffs aver their properties sustained damage as a result of these events.

The *Chehardy* plaintiffs also allege that "any damages attributable to the levee failures are the result of improper and/or negligent design, construction, [or] maintenance of the levees by various third parties and or third party negligence." The complaint

refers to engineering reports concluding that "the vast amounts of the water that entered the City of New Orleans and the surrounding parishes came about as the result of levee failures caused by negligent design, negligent maintenance and/or inadequate materials and not by topping of the levees." The complaint also summarizes the testimony of the Chief of the Army Corps of Engineers that "the Corps neglected to consider the possibility that the levee walls atop the 17th Street Canal levee would lurch away from their footings under significant water pressure and eat away at the earthen barriers below" and that "N he levees simply failed to work the way they were supposed to work." Additionally, the complaint alleges that "the levee breach of the Industrial Canal to the Lower Ninth Ward side was caused by an inadequately moored barge that crashed into the levee wall, rupturing the levee and compromising its ability to hold water back."

The *Chehardy* plaintiffs assert in their complaint that each was insured under an all-risk insurance policy and that their losses are covered perils under their all-risk policies. They allege that they timely filed claims with their insurers but their insurers denied coverage and have refused to indemnify them. The *Chehardy* plaintiffs acknowledge that their policies contained flood exclusions, but they assert that these exclusions should not be read so broadly as to disallow coverage for their damages because to do so "would contravene the very purpose of [all-risk] policies." They posit that the reasonable expectations of Louisiana policyholders would be that "flood" would "encompass overflowing of the Mississippi River, accumulation of water due to heavy rainfalls, or similar phenomena, but not the failing of the levees "due to negligent conduct beyond [their] con-

trol." Additionally, they opine in their complaint that they should not be deprived of coverage where the insurers "have drafted vague, ambiguous and unclear limitations on coverage"; they allege that although other policies on the market clearly exclude harm caused by the failure of levees, theirs do not.

The *Chehardy* plaintiffs seek a declaratory judgment that the efficient proximate causes of their damage were windstorm, acts of negligence, and storm surge, all of which were covered perils; that "[t]he breaking or failure of boundaries of lakes, reservoirs, rivers, streams, or other bodies of water was a peril not specifically excluded by any of the . . . policies"; and that "[t]he damage caused by water entering the City of New Orleans . . . due to the breaches in the levees . . . neither falls within the regular definition of 'flood,' nor within any of the subject insurance policies' exclusions of 'flood.'" The *Chehardy* plaintiffs also bring claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and insurance bad faith under section 22:1220 of the Louisiana Revised Statutes. Additionally, the plaintiffs bring claims for breach of fiduciary duty against State Farm, Allstate, Liberty Mutual, and other insurers who sell their homeowners insurance policies directly to their customers.

The *Chehardy* plaintiffs did not include in their complaint the pertinent language from their insurance policies, nor did they attach the policies or identify which plaintiff was insured through which defendant. Instead, copies of the policies were at-

tached to the defendants' motions seeking dismissal of the plaintiffs' claims.[6]

The policies of American, Auto Club, Hanover, Lafayette, Lexington, Liberty Mutual, Standard Fire, and Louisiana Citizens are nearly identical in every respect relevant to this appeal. All of these policies provide coverage for risk of direct physical loss to structures on the property as long as the risk is not an excluded peril. They also provide coverage for direct physical loss to personal property but only if the loss is caused by an enumerated peril and not by an excluded peril. With respect to both structures and personal property, the policies contain a list of

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[6] In its order, the district court stated that it was unable to identify with certainty which *Chehardy* plaintiffs were insured through which defendants:

> The Court has attempted to ascertain this information for purposes of specificity with respect to its ensuing orders herein; however, there is some confusion which prevents the Court from doing so. In addition to which, the information provided is not in the record. However, it has been represented to the Court by counsel that all insurers herein have provided at least one policy to one plaintiff, thus the Court will enter its orders with respect to the insurers and will not be able to identify the specific plaintiff who is [a]ffected by such order.

We examined the record on appeal and identified what appear to be insurance policies corresponding with each named *Chehardy* plaintiff except Wendell Glation and Andre and Marilyn Mauberret. With respect to those plaintiffs, we granted unopposed motions to supplement the record on appeal with copies of their policies. Nevertheless, we leave it to the district court on remand to identify with certainty which plaintiff was insured under which policy (or policies) for the purposes of orders to be entered subsequent to this appeal.

exclusions that are not insured against—among them, flood. The flood exclusions provide:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . . .
>
> . . . Water Damage, meaning:
>
> . . . Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind . . . .[7]

The Aegis policy is identical in all relevant respects to the above policies, with the exception of the lead-in clause before the flood exclusion. Aegis's policy contains an endorsement deleting the clause that excludes coverage "for loss caused directly or indirectly by" water damage "regardless of any other cause" and replacing it with the following: "We do not insure for loss caused by any of the following." The effect is that Aegis's flood exclusion reads as follows:

> We do not insure for loss caused by any of the following.
>
> . . . .
>
> . . . Water Damage, meaning:
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> . . . Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind . . . .

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[7] The only variations in language between these policies are immaterial to this appeal. For example, American and Hanover substitute the words "loss or damage" for "loss," Hanover inserts "any" before "body of water," and Hanover names its exclusion "Water" rather than "Water Damage."

The Great Northern policies provide coverage for risk of physical loss to the home and its contents except where provided otherwise or excluded by a policy exclusion. The policies contain a "Surface water" exclusion, which provides:

> Surface water. We do not cover any loss caused by:
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> • flood, surface water, waves, tidal water, or water borne material from any of these;
>
> • overflow of water or water borne material from a body of water;
>
> . . .
>
> from any source, even if driven by wind.

The policies also define "caused by" as "any loss that is contributed to, made worse by, or in any way results from that peril."

The Allstate policies provide coverage for losses to the dwelling and other structures on the insured property except as limited or excluded in the policies, as well as coverage for losses to personal property caused by certain enumerated causes and subject to exclusions. The policies contain the following flood exclusion:

> We do not cover loss to [insured] property . . . consisting of or caused by:
>
> . . . Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.

The State Farm policies in the *Chehardy* action are identical in every relevant respect to the State Farm policies in the *Vanderbrook* action.

Each of the defendants in the *Chehardy* action filed a Rule 12(b)(6) motion to dismiss for failure to state a claim. (The ISO Defendants filed a consolidated motion to dismiss.) The district court addressed only the claims for breach of contract and the request for declaratory relief. With respect to all defendants except State Farm, the court denied the motions to dismiss for the same reasons it denied the motions for judgment on the pleadings in the *Vanderbrook* action. With respect to State Farm, however, the district court granted the motion to dismiss for the same reason it granted State Farm's motion in the *Vanderbrook* action. As to the extra-contractual claims (for breach of the implied covenant of good faith and fair dealing, insurance bad faith, and breach of fiduciary duty), the district court denied the motions to dismiss without prejudice to their being re-urged at a later time, after the resolution of this appeal.

D. The *Humphreys* Action

In the *Humphreys* action, plaintiff-appellee-cross-appellant Kelly A. Humphreys filed suit against her insurer, defendant-appellant-cross-appellee Encompass Indemnity Company ("Encompass Indemnity"), in Louisiana state court.[8] Humphreys alleges that as Hurricane Katrina passed through New Orleans, the city "began pumping storm water runoff through various feeder canals into and through the 17th Street and London Avenue drainage canals into Lake Pontchartrain." "As a result of a 'sudden and accidental event' storm water drainage exerted pressure

[8] Humphreys amended her petition to add the Orleans Levee District as a defendant. Her claims against the Orleans Levee District are not at issue in this appeal.

against the storm wall and levee" erected along the canals, "causing the levee and storm wall to collapse" and "result[ing] in storm waters being distributed over large portions of New Orleans." Humphreys alleges that the cause of the collapse was "inadequate maintenance" of the levee and storm wall on the part of the Orleans Levee District. She avers that as a result of these events, her residence "was inundated with approximately 12 inches of storm water causing major damage to building and contents." She asserts that the efficient proximate cause of her loss was the levee and storm-wall collapse, not flood and surface water. Humphreys states that Encompass Indemnity has failed to pay for her losses, which she asserts were covered under her policy. She brings claims for breach of contract and breach of the duty of good faith and fair dealing, and she seeks compensatory damages, attorney's fees, and treble damages under various provisions of Title 22 of the Louisiana Revised Statutes.

Humphreys's homeowners policy with Encompass Indemnity covers direct physical loss to real property, as well as direct physical loss to personal property if caused by an enumerated peril. Both the real-property coverage and the personal-property coverage are subject to exclusions, including the following water-damage exclusion:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> 1. Real Property and Tangible Personal Property. We do not insure for loss:

a. Caused by water damage, meaning:

(1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

The policy also contains the following "Hurricane Deductible Endorsement":

> We will pay only that part of the total of the loss for all Property Coverages that exceeds the hurricane deductible stated on the Coverage Summary. The hurricane deductible shown on the Coverage Summary applies to all covered property for direct physical loss or damage caused directly or indirectly by a hurricane as defined below. Such deductible applies regardless of any other cause or event contributing concurrently or in any sequence to the loss. No other deductible provision in the policy applies to direct physical loss caused by a hurricane. In no event will the deductible applied for a hurricane loss be less than the property deductible shown on the Coverage Summary.
>
> Hurricane means wind, wind gust, hail, rain, tornado, cyclone or hurricane which results in direct physical loss or damage to property by a storm system that has been declared to be a hurricane by the National Weather Service. . . .
>
> . . . .
>
> All other provisions of this policy apply.

The *Humphreys* action was removed to federal court. On June 12, 2006, Humphreys and Encompass Indemnity settled and agreed to dismiss with prejudice (pursuant to Rule 41) the wind-damage portion

of Humphreys's claims as well as the entirety of her bad-faith claim. The parties' stipulation of partial dismissal specified that the remaining claim was the "claim to seek recovery for flood/rising water damage" under the policy.

The next day, Humphreys moved for partial summary judgment, asking the district court to rule that her policy provided coverage for flood damage to her residence pursuant to the policy's hurricane-deductible endorsement. At oral argument before the district court, according to the district court's order, Humphreys's counsel also adopted the *Chehardy, Vanderbrook*, and *Xavier* plaintiffs' arguments concerning the ambiguity of the flood exclusion, and the district court therefore construed Humphreys's partial-summary-judgment motion as also extending to the issue of the flood exclusion's applicability.[9]

The district court granted in part and denied in part Humpreys's motion. The court concluded that the hurricane-deductible endorsement did not itself create or extend coverage and denied Humphreys's partial-summary-judgment motion on this issue. But for the same reasons that the court construed most of the policies in the *Vanderbrook, Xavier*, and *Chehardy* actions as providing coverage, the court

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[9] Encompass Indemnity disputes that Humphreys properly asserted the issue of the flood exclusion's applicability in her motion for partial summary judgment. Encompass Indemnity characterizes the district court's grant of partial summary judgment in Humphreys's favor on this issue as sua sponte and contends that it did not receive Rule 56(c)'s requisite notice. Because we conclude that even if Encompass Indemnity did have notice, the grant of partial summary judgment was nonetheless erroneous, we need not address whether Encompass Indemnity received the required notice.

concluded that Humphreys's alleged damage was covered under her policy and granted partial summary judgment in her favor on this issue.

E. Appeal

The district court certified that its orders involved a controlling question of law as to which there is a substantial ground for a difference of opinion and that appeal may materially advance the ultimate termination of the litigation. All appellants and cross-appellants timely sought leave from this court to appeal from the district court's interlocutory order pursuant to 28 U.S.C. § 1292(b), and we granted their requests.

All defendants except State Farm now appeal the district court's order concluding that the water damage resulting from the levee breaches was not excluded by their policies' flood exclusions. The *Chehardy* plaintiffs and the *Vanderbrook* plaintiffs cross appeal the district court's grant of State Farm's motions to dismiss. And Humphreys cross appeals the district court's denial of her motion for partial summary judgment on the issue whether her policy's hurricane-deductible endorsement provides coverage for her losses.

II. STANDARD OF REVIEW

We review de novo the district court's order on a motion to dismiss for failure to state a claim under Rule 12(b)(6). The "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Martin K Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough

facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).[10] "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965 (quotation marks, citations, and footnote omitted).

Generally, in deciding a motion to dismiss for failure to state a claim, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." FED. R. CIV. P. 12(b). In this case, that would normally include the insurance contracts, since those documents were not attached to the complaints. But because the defendants attached the contracts to their motions to dismiss, the contracts were referred to in the complaints, and the contracts are central to the plaintiffs' claims, we may consider the terms of the contracts in assessing the motions to dismiss. *See Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the

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[10] We have often stated that a claim should not be dismissed under Rule 12(b)(6) unless the plaintiff would not be entitled to relief under any set of facts or any possible theory he may prove consistent with the allegations in the complaint. *See, e.g., Martin K Eby Constr.*, 369 F.3d at 467 (quoting *Jones*, 188 F.3d at 324). This standard derived from *Conley v. Gibson*, which stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46 (1957). But recently in *Bell Atlantic*, the Supreme Court made clear that the *Conley* rule is not "the minimum standard of adequate pleading to govern a complaint's survival." 127 S. Ct. at 1968-69.

plaintiffs complaint and are central to her claim." (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000))).

We also review de novo the district court's decision on a Rule 12(c) motion for judgment on the pleadings. *See Great Plains Trust Co. v. Morgan Stanley' Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (citing *Hughes v, Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001)). The standard for deciding such a motion is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See id.* at 313 n.8; *see also* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (3d ed. 2004). "The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Great Plains Trust Co.*, 313 F.3d at 312 (citing Hughes, 278 F.3d at 420).

We review a grant of summary judgment de novo, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). "Summary judgment is proper when the evidence reflects no genuine issues of material fact and the non-movant is entitled to judgment as a matter of law." *Id.* (citing FED. R. Civ. P. 56(c)). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. DISCUSSION

A. Controlling Law

In diversity cases such as these, federal courts must apply state substantive law. *Erie R.R. Co. v.*

Tompkins, 304 U.S. 64, 78 (1938); *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261, 265 (5th Cir. 1997). In determining which state's substantive law controls, the court applies the choice-of-law rules of the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The parties agree that in these Louisiana actions involving the interpretation of insurance policies issued in Louisiana for property located in Louisiana, Louisiana's substantive law controls. *Cf. Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003).

To determine Louisiana law, we look to the final decisions of the Louisiana Supreme Court. *See id.* In the absence of a final decision by the Louisiana Supreme Court, we must make an *Erie* guess and determine, in our best judgment, how that court would resolve the issue if presented with the same case. *See id.* In making an *Erie* guess, we must employ Louisiana's civilian methodology, whereby we first examine primary sources of law: the constitution, codes, and statutes. *Id.* (quoting *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 197 (5th Cir. 2003)); *Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.*, 179 F.3d 169 (5th Cir. 1999). "Jurisprudence, even when it rises to the level of *jurisprudence constante*, is a secondary law source in Louisiana." *Prytania Park Hotel*, 179 F.3d at 169 (footnote omitted); *see also Am. Int'l Specialty Lines Ins. Co.*, 352 F.3d at 261 (quoting *Transcon. Gas Pipe Line Corp. v. Transp. Ins.Co.*, 953 F.2d 985, 988 (5th Cir. 1992)). Thus, although we will not disregard the decisions of Louisiana's intermediate courts unless we are convinced that the Louisiana Supreme Court would decide otherwise, we are not strictly bound by them. *Am. Int'l Specialty Lines Ins. Co.*, 352 F.3d at 261.

Under Louisiana law, "[a]n insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts set forth in the Louisiana Civil Code." *Cadwallader v. Allstate Ins. Co.*, 848 So. 2d 577, 580 (La. 2003). The Louisiana Civil Code provides that [i]nterpretation of a contract is the determination of the common intent of the parties." LA. CIV. CODE ANN. art. 2045 (1987); *see also Cadwallader*, 848 So. 2d at 580; *La. Ins. Guar. Assoc. v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 763 (La. 1994), An insurance contract must be "construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to or made a part of the policy." LA. REV. STAT. ANN. § 22:654 (2004). Interpretation of an insurance contract generally involves a question of law. *Bonin v. Westport Ins. Corp.*, 930 So. 2d 906, 910 (La. 2006) (citing *Robinson v. Heard*, 809 So. 2d 943, 945 (La. 2002)); *see also La. Ins. Guar. Assoc.*, 630 So. 2d at 764.

"The words of a contract must be given their generally prevailing meaning." LA. CIV. CODE ANN. art. 2047 (1987); *see also Cadwallader*, 848 So. 2d at 580. "When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." LA. CIV. CODE ANN. art. 2046 (1987). "If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written." *Cadwallader*, 848 So. 2d at 580.

Where, however, an insurance policy includes ambiguous provisions, the "[ambiguity . . . must be re-

solved by construing the policy as a whole; one policy provision is not to be construed separately at the expense of disregarding other policy provisions." *La. Ins. Guar. Ass'n*, 630 So. 2d at 763 (citing LA. CIV. CODE ANN. art. 2050 (1987) ("Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.")). "Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract." LA. CIV. CODE ANN. art. 2048 (1987). "A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective." *Id.* art. 2049 (1987).

Ambiguity may also be resolved through the use of the reasonable-expectations doctrine—i.e., "by ascertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered." *La. Ins. Guar. Ass'n*, 630 So. 2d at 764 (quoting *Breland v. Schilling*, 550 So. 2d 609, 610-11 (La. 1989)). "The court should construe the policy to fulfill the reasonable expectations of the parties in light of the customs and usages of the industry.' *Id.* (quoting T*rinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 269 (5th Cir. 1990)). "A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties." LA. CIV. CODE ANN. art. 2053 (1987).

"If after applying the other general rules of construction an ambiguity remains, the ambiguous contractual provision is to be construed against the

drafter, or, as originating in the insurance context, in favor of the insured." *La. Ins. Guar. Ass'n*, 630 So. 2d at 764. Article 2056 of the Louisiana Civil Code provides: "In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." LA. CIV. CODE ANN. art. 2056 (1987). "Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer." *Cadwallader*, 848 So. 2d at 580. "That strict construction principle applies only if the ambiguous policy provision is susceptible to two or more *reasonable* interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable." *Id.* The fact that a term is not defined in the policy itself does not alone make that term ambiguous. *Am. Deposit Ins. Co. v. Myles*, 783 So. 2d 1282, 1287 (La. 2001).

"An insurance contract, however, should not be interpreted in an unreasonable or strained manner under the guise of contractual interpretation to enlarge or restrict its provisions beyond what is reasonably contemplated by unambiguous terms or achieve an absurd conclusion." *Cadwallader*, 848 So. 2d at 580. "Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation when the policy's provisions are couched in unambiguous terms." *Id.*

The policies in this case—which are homeowners, renters, and commercial-property policies—are all-

risk policies. All-risk policies "create[] a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage." *Alton Ochsner Med. Found. v. Allendale Mut. Ins. Co.*, 219 F.3d 501, 504 (5th Cir. 2000) (applying Louisiana law) (citing *U.S. Indus., Inc. v. Aetna Cas. & Sur. Co.*, 690 F.2d 459, 461 (5th Cir. 1982)). Insurers may, however, limit their liability under all-risk policies: "[A]bsent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and to enforce reasonable conditions upon the policy obligations they contractually assume." *Carbon v. Allstate Ins. Co.*, 719 So. 2d 437, 440 (La. 1998) (citing *La. Ins. Guar. Assoc.*, 630 So. 2d at 763); *see also Bonin*, 930 So. 2d at 911. But "[e]xclusionary provisions in insurance contracts are strictly construed against the insurer, and any ambiguity is construed in favor of the insured." *Ledbetter v. Concord Gen. Corp.*, 665 So. 2d 1166, 1169 (La. 2006) (citing *Garcia v. St. Bernard Parish Sch. Bd.*, 576 So. 2d 975, 976 (La. 1991)).

B. Flood Exclusions

The plaintiffs contend that their policies' flood exclusions do not unambiguously exclude coverage for losses caused by an inundation of water resulting from a breached levee where the breach occurred in part because the levee was negligently designed, constructed, or maintained. The plaintiffs urge us to conclude that the term "flood" is ambiguous in this context and that the policies must be construed in favor of coverage. By contrast, the insurers maintain

that the policies unambiguously exclude coverage for the inundation of water resulting from the breached levees.

The Louisiana Supreme Court has not interpreted a flood exclusion in the context of breached levees. We must therefore make an *Erie* guess and determine, in our best judgment, how that court would resolve the issue if presented with this case.[11] *Am. Intl Specialty Lines Ins. Co.*, 352 F.3d 254 at 260.

The plaintiffs first contend that because the term "flood" is not defined in the policies, it is ambiguous—indeed, the *Chehardy* plaintiffs say that the term's undefined status makes it per se ambiguous—requiring us to construe the term in favor of coverage. But the fact that a term used in an exclusion "is not defined in the policy itself . . . alone does not make the exclusion ambiguous; instead, [the court] will give the term its generally prevailing meaning." *Am. Deposit Ins. Co.*, 783 So. 2d at 1287 (citing LA. CIV.

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[11] The motions of Xavier and the *Chehardy* plaintiffs to certify the questions raised in this appeal to the Louisiana Supreme Court pursuant to Rule XII of the Louisiana Supreme Court Rules are denied. Although we acknowledge that the Louisiana Supreme Court has not issued a definitive ruling on the interpretation of a flood exclusion in the context of the facts before us, this is not alone sufficient to warrant certification. *See Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th Cir. 1997) (per curiam) ("Alone, the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification."). Because the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal, we decline the certification requests. *Cf. Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 564 (5th Cir. 1992) (refusing to certify question where "decisional analysis is relatively straightforward").

CODE art. 2047); *see also Hendricks v. Am. Employers Ins. Co.*, 176 So. 2d 827, 830 (La. Ct. App. 1965);[12] *accord Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263, 1270 (Cal. 1993) (rejecting rule that absence of definition makes term ambiguous even where term has generally accepted meaning and stating: "[A]ny rule that rigidly presumed ambiguity from the absence of a definition would be illogical and unworkable. To avoid the ambiguity perceived . . . , an insurer would have to

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[12] The *Chehardy* plaintiffs cite *Hendricks* for the proposition that if an insurance company fails to define a pertinent term of the policy or exclusionary provision, the court must adopt the meaning of that term most favorable to the policyholders. But *Hendricks* states: "Where . . . a particular word or phrase is not defined [in the insurance policy], the courts will endeavor by means of generally accepted legal techniques to ascertain the common and popular meaning of such word or phrase." 176 So. 2d at 830. Rather than immediately construe the undefined term in favor of the insured, the *Hendricks* court first looked to dictionary definitions and other cases to determine if the term was ambiguous. *See id.* at 83031.

The *Chehardy* plaintiffs also cite *Arnette v. NPC Services, Inc.*, 808 So. 2d 798 (La. Ct. App. 2002). In that case the term being construed was "professional duty" in the context of a professional-liability exclusion. The *Arnette* court did state: "Further, because 'professional duty' is undefined in the First State policy, we conclude the professional liability exclusion is ambiguous and must be construed in favor of NUS and against First State." *Id.* at 803. But the term "professional duty," unlike "flood," lacks any generally prevailing meaning in common parlance, and it thus provided no clear indication of what coverage was being excluded. *Arnette* cannot stand for the proposition that even though a term has a generally accepted meaning outside the context of the policy, the policy's failure to define it nonetheless makes it ambiguous; otherwise *Arnette* would conflict with article 2047's command to give the words of a contract their generally prevailing meaning. *See* LA. CIV. CODE ANN. art. 2047.

define every word in its policy, the defining words would themselves then have to be defined, their defining words would have to be defined, and the process would continue to replicate itself until the result became so cumbersome as to create impenetrable ambiguity.").

The plaintiffs also maintain that because the insurers could have more explicitly excluded floods that are caused in part by negligence, their failure to do so in these policies makes the flood exclusions ambiguous. Specifically, the *Chehardy* plaintiffs point to evidence that before Hurricane Katrina struck, the insurer defendants knew about the availability of policy forms that more explicitly excluded floods caused in part by man but that they elected not to amend their policies' language accordingly. Xavier, which was insured through Travelers, also points to its policy's "earth movement" exclusion, which excludes earth movements "whether natural or man made"; Xavier asserts that Travelers thus knew how to clearly exclude man-made floods but did not do so. Similarly, the district court compared the flood exclusions in most of the policies with those in the policies of State Farm and Hartford Insurance Company of the Midwest,[13] remarking that those insurers succeeded with little effort in clearly excluding water damage resulting from negligent acts and that the other insurers could have done so as well.

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[13] Hartford Insurance Company of the Midwest ("Hartford") was a defendant in the *Vanderbrook* action. The district court granted Hartford's motion to dismiss for failure to state a claim because its policy explicitly excluded coverage for loss caused by release of water held by a levee. The *Vanderbrook* plaintiffs do not appeal this aspect of the district court's order, and Hartford is therefore not a party to this appeal.

But the fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous. *See La. Ins. Guar. Ass'n*, 630 So. 2d at 766 ("[T]hough . . . the Interstate policy could have more clearly delineated its payment obligation, 'that fact does not mandate the conclusion that the policy was legally ambiguous.'" (quoting *Garmany v. Mission Ins. Co.*, 785 F.2d 941, 945-46 (11th Cir. 1986)). Nor does the fact that other policies have more explicitly defined the scope of similar exclusions. As the Louisiana Supreme Court stated in *Cadwallader* when interpreting the term "relative":

> The appellate court further erred in reaching a conclusion that because some insurance policies specifically include foster children in their policy definition of "relative" or "family member," the term "relative" is somehow rendered ambiguous in the policy at issue. In making this assumption, the appellate court ignored the fundamental precept that it was required to interpret the term using its plain, ordinary and generally prevailing meaning as set forth in the policy at hand. . . . It is the particular insurance policy of the insured that establishes the limits of liability and it is well established that this contract of insurance is the law between the parties. When we find the contract of insurance is clear and unambiguous . . . we must enforce the policy as written.

848 So. 2d at 583. We therefore reject the plaintiffs' arguments that the flood exclusions in the policies before us are ambiguous in light of more specific language used in other policies.[14]

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[14] To the extent that the plaintiffs also argue that the language of the other policies may be used to resolve ambiguity

Furthermore, even where the scope of an exclusion is not readily apparent, we do not immediately construe that exclusion in favor of coverage. Instead, we first apply the general rules of contract construction set forth in the Civil Code. *La, Ins. Guar. Ass'n*, 630 So. 2d at 764. Under those rules, we give the words of a contract their "generally prevailing meaning." LA. CIV. CODE ANN. art 2047. Dictionaries, treatises, and jurisprudence are helpful resources in ascertaining a term's generally prevailing meaning. *See Gregor v. Argent Great Cent. Ins. Co.*, 851 So, 2d 959, 964 (La. 2003) ("Dictionaries are a valuable source for determining the 'common and approved usage' of words."); *Cadwallader*, 848 So. 2d at 581-83 (looking to dictionaries, treatises, and jurisprudence to interpret the term "relative"). When the words of a policy provision are clear and unambiguous in the context of the facts of the case and do not lead to an absurd result, we apply the provision as written without any further interpretation. *See Cloud v. Nat'l Auto. Ins. Co.*, 875 So. 2d 866, 870 (La. Ct. App. 2004); LA. CIV. CODE ANN. art. 2046.

To ascertain the generally prevailing meaning of the term "flood," we begin by considering dictionary definitions of the term. Each of the dictionaries we have accessed lists more than one definition of "flood," but the existence of more than one definition of a term does not itself make the term ambiguous. *Citation Ins. Co. v. Gomez*, 688 N.E.2d 951, 953 (Mass. 1998); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY Explanatory Notes at 17a n,12.4 (2002) (explaining that when a word has

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(not simply to demonstrate that an ambiguity exists), we need not look to other policies because the flood exclusions in the policies before us are unambiguous in the context of these facts.

multiple definitions, the best definition "is the one that most aptly fits the context of an actual genuine utterance"). Likewise, when "a word has two meanings, one broad and one more restrictive included within the broader meaning, it does not follow that the narrower meaning was intended." *Comm. Union Ins. Co. v. Advance Coating Co.*, 351 So. 2d 1183, 1186 (La. 1977); *see also Falgout v. Walter Jester, Hampton Inc.*, 883 So. 2d 515, 520 (La. Ct. App. 2004).

The Oxford English Dictionary has two pertinent definitions of "flood": (1) "[a]n overflowing or irruption[15] of a great body of water over land not usually submerged; an inundation, a deluge" and (2) "[a] profuse and violent outpouring of water; a swollen stream, a torrent; a violent downpour of rain, threatening an inundation." 5 OXFORD ENGLISH DICTIONARY 1075-76 (2d ed. 1989). Webster's Dictionary defines "flood" as "a rising and overflowing of a body of water that covers land not usu[ally] under water . . . [;] an outpouring of considerable extent . . [;] a great downpour." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 873 (2002). The sixth edition of Black's Law Dictionary defines "flood" as follows: "An inundation of water over land not usually covered by it. Water which inundates area of surface of earth where it ordinarily would not be expected to be." BLACK'S LAW DICTIONARY 640 (6th ed. 1990). "Flood" itself is not defined in the current (eighth) edition of Black's Law Dictionary, but "floodwater" is defined as "[w]ater that escapes from a watercourse in large

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[15] "Irruption" is "[t]he action of bursting or breaking in; a violent entry, inroad, incursion, or invasion, especially] of a hostile force or tribe." 8 OXFORD ENGLISH DICTIONARY 104 (2d ed. 1989).

volumes and flows over adjoining property in no regular channel." BLACK'S LAW DICTIONARY 1622 (8th ed. 2004). The most straightforward definition comes from the American Heritage Dictionary: "An overflowing of water onto land that is normally dry." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 674 (4th ed. 2000). Finally, of particular interest is the discussion of "flood" in the Columbia Encyclopedia, which specifically includes in the definition the inundation of water resulting from the bursting of a levee:

> [I]nundation of land by the rise and overflow of a body of water. Floods occur most commonly when water from heavy rainfall, from melting ice and snow, or from a combination of these exceeds the carrying capacity of the river system, lake, or ocean into which it runs. . . .
>
> . . . Less predictable are *floods resulting from . . . the bursting of a natural or man-made dam or levee.*
>
> . . . .
>
> In the United States the Johnstown, Pa., flood of 1889, in which thousands of lives were lost, was caused by the breaking of an earth dam above the city.

COLUMBIA ENCYCLOPEDIA 1002 (6th ed. 2000) (emphasis added).

We also consider the definitions of "flood" in treatises. Appleman's Insurance Law and Practice defines "flood waters" as "those waters above the highest line of the ordinary flow of a stream, and generally speaking they have overflowed a river, stream, or natural water course and have formed a

continuous body with the water flowing in the ordinary channel." 5 JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 3145 (1970). And Couch on Insurance defines "flood" as "the overflow of some body of water that inundates land not usually covered with water." STEVEN PLITT ET AL., COUCH ON INSURANCE § 153:54 (3d ed. 2006) [hereinafter COUCH]. Couch also states that the term "flood" is generally unambiguous. *Id.* § 153:49.

Additionally, we look to jurisprudence, both from Louisiana courts and from courts outside Louisiana. In *Riche v. State Farm Fire & Casualty Co.*, an intermediate Louisiana court interpreted a policy's exclusion for "flood, surface water, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not." 356 So. 2d 101, 103 (La. Ct. App. 1978). The plaintiff in *Riche* was fishing in a boat on a lake when a windstorm caused the boat to sink, *id.* at 103, and he sought recovery under his home-owners insurance policy for the loss of his fishing gear, which was on the boat when it sank, *id.* at 102. The court held that the exclusion did not preclude the plaintiff's recovery, reasoning that the "exclusion, when read as a whole, contemplates only such damage caused by water which has risen over and covered areas not ordinarily covered by water" and does not extend to "damage caused by windstorm (or resulting waves) over a body of water, such as a lake or reservoir." *Id.* at 103-04. *Riche*, however, is of limited value in this case because its determination was simply that a water-damage exclusion applied only to losses that occurred on areas not normally covered by water (i.e., dry land) and not to a loss occurring on a body of water. *See id.* at 103-04; *see also* COUCH, *supra*, at § 153:54 (citing *Riche* for the

proposition that [b]ecause a flood is generally understood to mean the inundation of land, claims by insurers that the inundation of a boat on the water is an excluded flood are generally unsuccessful"). Unlike in *Riche*, the losses in this case occurred on land that is normally dry.

Where courts outside Louisiana have considered whether a flood exclusion similar to the ones here unambiguously precludes coverage for water damage resulting from the failure of a structure such as a dam or dike, they have uniformly declared that the inundation of water falls within the language of the exclusion. Russell G. Donaldson, Annotation, *What is "Flood" Within Exclusionary Clause of Property Damage Policy*, 78 A.L.R.4th 817 (1990 & Supp. 2007) (citing *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678 (Colo. 1989); *Bartlett v. Cont'l Divide Ins. Co.*, 697 P.2d 412 (Colo Ct. App. 1984); and *E.B. Metal & Rubber Indus., Inc. v. Fed. Ins. Co.*, 84 A.D.2d 662 (N.Y. App. Div. 1981)).[16]

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[16] The plaintiffs argue that *E.B. Metal*, which involved a broken dike, may be distinguished because the flood exclusion in that case included in the definition of "flood" the phrase "rising (including overflowing or *breaking of boundaries*) of lakes, reservoirs, rivers, streams, or other bodies of water." 84 A.D.2d at 662-63 (emphasis added). The plaintiffs assert that "breaking of boundaries" would include breaches of levees. We agree that *E.B. Metal*'s rationale may not be fully applicable to this case on this basis. Nevertheless, the plaintiffs have not directed us to any authority contradicting the proposition that in the context of a broken dam, levee, or other similar structure, courts have reached a consensus that the term "flood" is unambiguous and that flood exclusions preclude recovery.

We also do not include in our analysis *TNT Speed & Sport Center, Inc. v. American States Insurance Co.*, 114 F.3d 731 (8th Cir. 1997), or *Pakmark Corp. v. Liberty Mutual Insurance Co.*,

The most prominent such case is *Kane*, which arose in the context of the failure of the Lawn Lake Dam in Colorado. *See* 768 P.2d at 679. As a result of the dam failure, water swept into the Fall River and inundated the plaintiffs' insured property, causing extensive damage. *Id.* The plaintiffs argued that their all-risk policies provided coverage for the damage, even though the policies contained flood exclusions.[17] *Id.* at 680. The Colorado Supreme Court rejected this argument and construed the term "flood" as extending to the water damage resulting from the dam failure. The court relied in part on dictionary definitions and the definition of "flood" in Appleman's treatise and observed that "[t]he inundation of insureds' normally dry land falls squarely within these generally accepted definitions of the term 'flood.'" *Id.*

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943 S.W.2d 256 (Mo. Ct. App. 1997), because the parties in those cases did not dispute that a flood had occurred. Nor do we rely on *Florida East Coast Railway v. United States*, 519 F.2d 1184 (5th Cir. 1975), or other cases interpreting the phrase "floods or flood waters" in 33 U.S.C. § 702c, which grants the United States immunity for damage resulting from floods, because the scope of the government's immunity may be broader than the exclusions in the policies before us, which we must strictly construe. *See Ledbetter*, 665 So. 2d at 1169.

[17] The flood exclusions in *Kane* provided:

> The Company shall not be liable for loss:
>
> . . . .
>
> 12. caused by, resulting from, contributed to, or aggravated by any of the following:
>
> . . .
>
> (b) flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not.

768 P.2d at 679-80 (omissions in original).

at 681. Concluding that the term was unambiguous in light of its generally accepted meaning and in the context of the facts of the case, the court declared that "there is no doubt that this large-scale inundation of water was a 'flood.'" *Id.*[18]

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[18] The district court attempted to distinguish *Kane* in three ways, none of which withstands scrutiny. First, the district court opined that *Kane* "applied the broadest possible definition" of the term "flood," whereas Louisiana law requires exclusions to be narrowly construed. It is not clear on what basis the district court believed *Kane* applied the broadest possible definition. The *Kane* court stated that it simply determined that in the context of the facts before it, the flood exclusion was unambiguous, and it applied the exclusion as written. This is entirely consistent with Louisiana law. *See Cadwallader*, 848 So. 2d at 580 ("If the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written.").

Second, the district court erroneously inferred that the failure of the Lawn Lake Dam in *Kane* resulted from water overtopping the dam. The court opined that this factually distinguished *Kane* from the case before us, where the allegations are not that the levees were overtopped but that they collapsed when faced with conditions they should have withstood. The district court relied on the following statement in *Kane*: "Although leakage from a ruptured city water line does not fall within [Appleman's] definition [of 'flood], the rising and *overflowing* of Fall River does. . . . [T]he Fall River clearly *overflowed* above the highest line of its ordinary flow." *Kane*, 768 P.2d at 682 (emphases added; brackets and quotation marks omitted). But *Kane* never stated nor implied that water overtopped the *dam*; instead, it stated that the *river*, which was downstream from the dam, overflowed its ordinary boundaries due to the large volume of water pouring in from the failed dam.

Third, the district court observed that it was unclear from *Kane* whether Colorado follows the doctrine of efficient proximate cause, pointing to the clause: "the 'efficient moving cause' rule, if it were to be adopted by this court." *Id.* at 685. Assuming without deciding that Louisiana does follow the efficient-proxi-

In *Wallis v. Country Mutual Insurance Co.*, an Illinois intermediate court stated that the "plain and ordinary meaning" of "flood" is "water that escapes from a watercourse in large volumes and flows over adjoining property in no regular channel ending up in an area where it would not normally be expected." 723 N.E.2d 376, 383 (Ill. Ct. App. 2000). The court held that it was immaterial that a particular watercourse was originally man-made as long as it had a defined bed, visible banks, and a recurrent water flow. *See id.* Indeed, the court observed that a permanent watercourse with these characteristics is considered a natural watercourse. *See id.* at 382; *see also* BLACK'S LAW DICTIONARY 1623 (8th ed. 2004) ("If [a man-made] watercourse is of a permanent character and has been maintained for a sufficient length of time, it may be considered a natural watercourse . . . ."). Accordingly, the *Wallis* court held that water that had overflowed a man-made creek's banks and damaged the plaintiffs house was a flood within the plain and ordinary meaning of the term, *id.* at 383, and that the plaintiffs loss was excluded by his insurance policy's flood exclusion, *id.* at 384.

In light of these definitions, we conclude that the flood exclusions are unambiguous in the context of this case and that what occurred here fits squarely within the generally prevailing meaning of the term

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mate-cause doctrine, the doctrine has no impact on how a term within a policy exclusion should be construed. The doctrine comes into play only when both a covered loss and an excluded loss are identified. *See Pieper v. Commercial Underwriters Ins. Co.*, 69 Cal. Rptr. 2d 551, 557 (Cal. Ct. App. 1997). This distinction therefore is immaterial.

"flood." When a body of water overflows[19] its normal boundaries and inundates an area of land that is normally dry, the event is a flood. This is precisely what occurred in New Orleans in the aftermath of Hurricane Katrina. Three watercourses—the 17th Street, Industrial, and London Avenue Canals—overflowed their normal channels, and the levees built alongside the canals to hold back their floodwaters failed to do so. As a result, an enormous volume of water inundated the city. In common parlance, this event is known as a flood.

Additionally, a levee is a *flood*-control structure; its very purpose is to prevent the floodwaters of a watercourse from overflowing onto certain land areas, i.e., to prevent floods from becoming more widespread. *See* 50 AM. JUR. 2D *Levees and Flood Control* § 1 (2006) (defining "levee" as "an embankment constructed along the edge of a river to prevent flooding" and describing levees as one of three principal means of flood prevention and control); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1300 (2002) (defin-

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[19] The district court noted the presence of the word "overflowing" in many of the dictionary definitions and explicitly equated "overflowing" with "overtopping" (even though the term "overtopping" was nowhere to be found in the definitions), referring to the definitions as "the 'overtopping' definitions." Since the levees' failures here are not alleged to have occurred due to water overtopping the levees, the court inferred that the breaches did not result in a flood. But the court's substitution of "overtopping" for "overflowing' was erroneous. "Overflow" means (1) "No flow over; to overspread or cover with water or other liquid; to flood, inundate"; (2) "Rio pass or spread over like a flood, so as to pervade, fill, cover, submerge, overwhelm, etc."; and (3) "Rio flow over (the brim, banks, or sides)." 10 OXFORD ENGLISH DICTIONARY 1086. This is much broader than "overtop," which means "No rise over or above the top of; to surpass in height, surmount, tower above, top." *Id.* at 1131.

ing "levee" as "an embankment designed to prevent flooding"). By definition, whenever a levee ruptures and fails to hold back floodwaters, the result is a more widespread flood. That a levee's failure is due to its negligent design, construction, or maintenance does not change the character of the water escaping through the levee's breach; the waters are still floodwaters, and the result is a flood.

The plaintiffs, however, attempt to inject ambiguity into the term "flood" by asserting that a reasonable interpretation of the term is that it refers only to inundations of water with "natural" causes, not those with a "non-natural" cause. The plaintiffs rely primarily on cases interpreting flood exclusions in the context of broken water mains. They also assert, applying two canons of construction, *noscitur a sociis* and *ejusdem generis*, that a flood includes only natural events because the other terms in the water-damage exclusions are natural phenomena. Additionally, they contend that a reasonable policyholder would expect that only naturally occurring floods would be excluded.

Before we address these contentions, we first question the notion that the flood in this case was non-natural. The plaintiffs focus on the alleged negligent design, construction, or maintenance of the levees as being the cause of the flood, and we accept as true (for the purpose of assessing the motions to dismiss) their allegation that the canals' floodwaters would not have reached their property had the negligence not occurred. This focus, however, ignores the sizeable natural component to the disaster: a catastrophic hurricane and the excess water associated with it. The non-natural component is simply that in certain areas, man's efforts to mitigate the effect of

the natural disaster failed, with devastating consequences. But if man's failure to adequately prepare for a natural disaster could alone transform the disaster into a non-natural event outside the scope of a policy's exclusion, it is difficult to conceive how an insurer could ever exclude the resulting loss; any natural event could be recharacterized as non-natural either because man's preventative measures were inadequate or because man failed to take preventative measures at all.

Even if we accept the plaintiffs' characterization of the flood in this case as non-natural, we disagree that the term "flood" in this context is limited to natural events. The plaintiffs first maintain that dictionary definitions support their interpretation, but the dictionaries we have reviewed make no distinction between floods with natural causes and those with non-natural causes.[20] Indeed, the Columbia Encyclopedia specifically states that a flood may result from the bursting of a levee. *See* COLUMBIA ENCYCLOPEDIA 1002. Similarly, Appleman's treatise states: "A 'flood,'

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[20] Xavier points to the mentioning of "Act of God" in the sixth edition of Black's Law Dictionary's definition of "flood" as authority for limiting floods to natural events. Since an "Act of God" is "[a]n act occasioned exclusively by forces of nature without the interference of any human agency," BLACK'S LAW DICTIONARY 33 (6th ed. 1990), Xavier posits that for an event to be a flood, it must be purely natural. But Black's Law Dictionary does not include "Act of God" in the definition of "flood" or indicate that they are entirely synonymous; it instead cross-references (i.e., it states, "*See also*") "Act of God" at the end of the definition. *See id.* at 640. This singular cross-reference is not sufficient to persuade us that the dictionary definitions of "flood" limit it to purely naturally occurring events. Furthermore, as we explained, the flood occurred here in the context of an enormous hurricane, and it thus had a significant natural component.

contemplated by the exclusion, can result from either natural or artificial causes." 5 JOHN ALAN APPLEMAN & JEAN APPLEMAN, supra, at § 3145 (Supp. 2007) (citing *Kane*, 768 P.2d 678).

The plaintiffs next rely heavily on a line of cases, arising in the context of broken water mains, holding that the term "flood" in a policy's exclusion was ambiguous based on a distinction between natural and non-natural events. For example, in *Ferndale Development Co. v. Great American, Insurance Co.*, a Colorado intermediate court observed that "[s]everal cases have held that ['flood] applies] only in cases where 'natural' water sources are involved," and it concluded that the term was ambiguous and thus did not extend to water from a burst water main. 527 P.2d 939, 940 (Colo. Ct. App. 1974); *see also Ebbing v. State Farm Fire & Gas. Co.*, 1 S.W.3d 459 (Ark. Ct. App. 1999) (following *Ferndale* and concluding that "the term 'flood' is unambiguous but that its common usage applies to water occasioned from natural events rather than a burst water main"). Similarly, a New York intermediate court held that a flood exclusion did not apply in the context of a broken water main because the term "flood" "connotes an inundation; a deluge." P*opkin v. Sec. Mut. Ins. Co. of N.Y.*, 48 A.D.2d 46, 48 (N.Y. App. Div. 1975). That court also opined that even if the term "flood" is to be read broadly so as to include any "great quantity" of water, the term should be construed in light of the other terms in the exclusion (surface water, waves, tidal water, tidal wave, etc.), which it stated "relate to natural phenomena." *Id.; see also Ender v. Nat'l Fire Ins. Co. of Hartford*, 169 A.D.2d 420, 421 (N.Y. App. Div. 1991) (following *Popkin* and concluding that flood exclusion did not bar recovery for damage resulting from water-main break because the exclu-

sion "preclude [d] only recovery for damages arising from natural causes, not from artificial devices"); *cf. Mellon v. Hingham Mat. Fire Ins. Co.*, 472 N.E.2d 674, 675 (Mass. App. Ct. 1984) (concluding that exclusion for "water below the surface of the ground" did not exclude damage from drainage pipe's rupture because the "loss was caused by an accidental break rather than a natural occurrence" and, as a fortuity, was "the kind of risk an 'all risk' policy is designed to cover").[21]

Although we do not quibble with the results reached in the water-main cases, we do not believe that a distinction between natural and non-natural causes is applicable in this context. First, unlike a

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[21] The plaintiffs also rely on cases interpreting "earth movement" exclusions in insurance policies. Such exclusions typically define "earth movement" as including earthquake, volcanic eruption, landslide, subsidence, mud flow, sink hole, erosion, sinking, shifting, and settling. *See, e.g., Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 8 (W. Va. 1998). "A small majority of jurisdictions hold that [such] exclusions do not apply to earth movements that are non-natural in origin or source." COUCH, *supra*, at § 153:65 (collecting cases); *see also id.* §§ 153:66-:67; *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086-89 (Fla. 2005); *Murray*, 509 S.E.2d at 4-5, 10; *Peach State Uniform Serv., Inc. v. Am. Ins. Co.*, 507 F.2d 996, 1000 (5th Cir. 1975) (applying Georgia law).

We do not question the holdings or the rationale of the earth-movement cases. But the usefulness of a distinction between natural and non-natural causes in one context does not necessarily mean that the distinction is warranted in an unrelated context. These two contexts are unrelated in part because the term "earth movement," unlike "flood," does not have a generally prevailing meaning in common parlance. And as we explain, a distinction between natural and non-natural causes in the context of a broken levee would be unworkable and would yield absurd results.

canal, a water main is not a body of water or watercourse. Many (although not all) dictionary definitions define "flood" as an overflow or inundation of a body of water or watercourse.[22] Likewise, Appleman's treatise observes that flood waters generally come from a "river, stream, or natural water course."[23] JOHN ALAN APPLEMAN & JEAN APPLEMAN, *supra*, at § 3145. So where a water-main break is involved, it is less clear that the flow of water is within the generally prevailing meaning of "flood." *See Kane*, 768 P.2d at 681 (reasoning that in the context of a ruptured water main, the term "flood" is ambiguous in part "because a water main is not so clearly a body of water" (quotation marks omitted)); *Wallis*, 723 N.E.2d at 383 (distinguishing between rupture of water main and overflow of watercourse, regardless of whether the watercourse was originally man-made or forged from nature). Couch on Insurance recognizes a distinction between water-main breaks and the overflow of a body of water and opines that the body-of-water delineation is more useful

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[22] The Oxford English Dictionary and Webster's Dictionary refer to "body of water." 5 OXFORD ENGLISH DICTIONARY 1075-76; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 873. Black's Law Dictionary refers to "watercourse." BLACK'S LAW DICTIONARY 1622 (8th ed. 2004). And the Columbia Encyclopedia refers to "river system, lake, or ocean." COLUMBIA ENCYCLOPEDIA 1002.

[23] A man-made watercourse may be considered natural if it is permanent and has been maintained for a sufficient length of time. BLACK'S LAW DICTIONARY 1623 (8th ed. 2004); *see also Wallis v. Country Mut. Ins. Co.*, 723 N.E.2d 376, 382 (111. Ct. App. 2000) (stating that a permanent watercourse with a defined bed, visible banks, and a recurrent water flow is considered natural, even if it was originally man-made).

than the natural/non-natural distinction in determining whether an event is a flood:

> Some jurisdictions attempt to distinguish naturally occurring floods from inundations from artificial or man-made causes such as dams or water mains. Such distinctions lead to apparent inconsistencies. For example, an inundation from the failure of a dam is considered a flood, while water pouring from a broken water main is not a flood. Therefore, distinguishing events based on whether the inundation had a natural or artificial cause may be unhelpful, especially if the policy itself does not make such a distinction. Instead, the key to reconciling these cases lies in the common definition of a flood as an overflow from a body of water. Thus, when the inundation results from the overflow of a body of water, whether natural or artificial, the event is a flood. Conversely, if the inundation does not arise from the overflow of a body of water, as when a water main breaks, the event is not a flood.

COUCH, *supra*, at § 153:54 (footnotes omitted).[24]

Second, the amount of water generally released from a broken water main is not comparable to the massive inundation of water that occurred when the levees in New Orleans ruptured. *Cf. Kane*, 768 P.2d at 681 (distinguishing water-main cases on the basis that the amount of water released from a broken

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[24] Xavier's counsel contended at oral argument that the canals in this case were not bodies of water because they were man-made. We disagree; the canals in this case are plainly watercourses, regardless of their man-made genesis. And a flood may result from the overflow of a watercourse regardless of whether it was man-made. *See Wallis*, 723 N.E.2d at 383.

water main is "less clearly an inundation or deluge" (quotation marks omitted)). A broken water main or other pipe would generally be expected to produce more localized water damage and lacks the same potential to inundate large swaths of land that a breached levee or a failed dam would have. Although the plaintiffs argue that the quantity of water involved should make no difference and that the key inquiry instead should be the cause of the water damage, inherent in the definition of "flood" is the concept of inundation or deluge, and it seems apparent that the greater the inundation involved in an event, the more clearly that event is a flood. *See Popkin*, 48 A.D.2d at 48 (concluding that flood exclusion does not encompass water-main break because the term "flood" "connotes an inundation; a deluge").

Third, and most important, unlike water mains, levees are flood-control structures, which by definition means that they interact with floodwaters. Because levees are man-made, one could point to man's influence nearly any time a levee fails. If a levee fails despite not being overtopped by the floodwaters, it is because the levee was not adequately designed, constructed, or maintained. If a levee fails due to the floodwaters overtopping it or loosening its footings, it is because the levee was not built high enough or the footings were not established strongly or deeply enough. Even where a levee does not fail, one could find a non-natural flood; where a properly designed and constructed levee causes floodwaters to be diverted downstream to another area of land, the resulting flood downstream occurs because the levee performs as designed. Any time a flooded watercourse encounters a man-made levee, a non-natural component is injected into the flood, but that does not cause the floodwaters to cease being floodwaters. *Cf.*

Smith v. Union Auto. Indem. Co., 752 N.E.2d 1261, 1267 (Ill. App. Ct. 2001) (concluding that surface water does not lose its characterization as surface water simply because it is touched or affected by man-made structures). The distinction between natural and non-natural causes in this context would therefore lead to absurd results and would essentially eviscerate flood exclusions whenever a levee is involved. Consequently, we decline to follow this approach in this case. *See* LA. CIV. CODE ANN. art. 2049 (directing the court to interpret a term with a meaning that renders that term effective).

The plaintiffs additionally contend that the canons of construction known as *noscitur a sociis* and *ejusdem generis* support the proposition that the term "flood" is limited to purely natural events.[25] Although we have concluded that the distinction between natural and non-natural events in this context is unworkable and would lead to absurd results, we will nonetheless engage the plaintiffs' arguments about these canons. Under the canon of *noscitur a sociis*, a term is interpreted by considering the meaning of the terms associated with it. *See United States v. Golding*, 332 F.3d 838, 844 (5th Cir. 2003) (per curiam); BLACK'S LAW DICTIONARY 1087 (8th ed. 2004) ("A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."). Under the canon of *ejusdem generis*, "where

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[25] In the context of interpreting earth-movement exclusions, some courts have applied these canons of construction to support a distinction between naturally and non-naturally occurring earth movements. *See* COUCH, *supra*, at § 153:66; *Murray v. State Farm Fire & Cos. Co.*, 509 S.E.2d. 1, 9 (W. Va. 1998).

general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." *First Am. Title Ins. Co. v. First Trust Nat'l Ass'n (In re Biloxi Casino Belle Inc.)*, 368 F.3d 491, 500 (5th Cir. 2004); *see also* BLACK'S LAW DICTIONARY 556 (8th ed. 2004). The plaintiffs assert that under these canons, the term "flood" includes only naturally occurring events because the other terms in the water-damage exclusions—e.g., "surface water," "waves," "tidal water," and "overflow of a body of water"—are events that occur naturally.

We disagree that the other terms in the exclusion necessarily refer to natural events. For example, a "surface water" exclusion has been held to bar coverage where the inadequate design of a drainage system caused water to accumulate rather than drain away, resulting in water damage. *See Front Row Theatre, Inc. v. Am. Mfr.'s Ins. Cos.*, 18 F.3d 1343, 1348 (6th Cir. 1994) (applying Ohio law). And the term "waves" has been held to "encompass[] both those waves which are motivated by natural forces and those motivated by artificial forces" such as passing motorboats. *See O'Meara v. Am. States Ins. Co.*, 268 N.E.2d 109, 111-12 (Ind. Ct. App. 1971). Since at least some of the terms immediately surrounding "flood" in the water-damage exclusions also relate to both natural and non-natural events, the canon of *noscitur a sociis* does not support the plaintiffs' proposed limitation of the term "flood." And *ejusdem generis* is not at all applicable in interpreting "flood" in the exclusions before us. This canon is used to interpret general terms (e.g., "and the like") following a list of specific terms. *See First Am. Title Ins. Co.*, 368 F.3d at 500. But "flood" is not a

general term; it is one of the specific terms listed in the definition of "water damage." Moreover, if we were to employ these canons to justify a distinction between natural and non-natural floods in the context of the facts before us, we would be injecting ambiguity into an otherwise unambiguous term. We decline to do so. *See Tourdot v. Rockford Health Plans, Inc.*, 439 F.3d 351, 354 (7th Cir. 2006) (stating that *ejusdem generis* applies only where a term is ambiguous, that it may not be used "both to create and to resolve the ambiguity," and that it "may not be used to defeat the obvious purpose or plain meaning of the text"); *Schenkel & Shultz, Inc. v. Homestead Ins. Co.*, 119 F.3d 548, 551 (7th Cir. 1997) ("We cannot use the doctrine [of *noscitur a sociis*] to create uncertainty in an otherwise unambiguous term . . . .").

The plaintiffs finally contend that the reasonable expectations of homeowners insurance policyholders would be that damage resulting from manmade floods would be covered. "[Ascertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered" is one way that ambiguity in an exclusion clause may be resolved. *La. Ins. Guar. Ass'n*, 630 So. 2d at 764. But "Louisiana law . . . precludes use of the reasonable expectations doctrine to recast policy language when such language is clear and unambiguous." *Coleman v. Sch. Bd. of Richland Parish*, 418 F.3d 511, 522 (5th Cir. 2005). As we have explained, the flood exclusions in the policies are unambiguous in the context of the specific facts of this case; thus, we need not resort to ascertaining a reasonable policyholder's expectations. For the sake of thoroughness, however, we will briefly address a few of the parties' arguments.

First, the plaintiffs assert that because their policies are all-risk policies, they have a heightened expectation of coverage and that a reasonable policyholder thus would not expect water damage resulting from third-party negligence to be excluded. Although a few courts have stated that insureds with all-risk policies have "heightened expectations" of coverage, *see, e.g., Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 14 (W. Va. 1998), we are not aware of any Louisiana court that has so held. And although all-risk policies do generally extend to all fortuitous losses, this is true only to the extent that the policy does not expressly exclude the loss from coverage. *See Alton Ochsner Med. Found.*, 219 F.3d at 504. Each policy in this case contains a specific provision expressly excluding damage caused by flood, and none of the exclusions indicates that whether a particular flood is excluded depends on whether its cause is purely natural. Given the generally prevailing use of the term "flood," we believe a reasonable policyholder would expect a massive inundation of water from a breached levee to be excluded, notwithstanding the all-risk nature of the policies.

Second, the plaintiffs assert that because many of the policies contained a "Hurricane Deductible Endorsement," reasonable policyholders would expect those policies to cover damage resulting from a hurricane. Many of the policies contained an endorsement materially similar to the following, from Humphreys's policy with Encompass Indemnity:

> We will pay only that part of the total of the loss for all Property Coverages that exceeds the hurricane deductible stated on the Coverage Summary. The hurricane deductible shown on the Coverage Summary applies to all covered prop-

> erty for direct physical loss or damage caused directly or indirectly by a hurricane as defined below. Such deductible applies regardless of any other cause or event contributing concurrently or in any sequence to the loss. No other deductible provision in the policy applies to direct physical loss caused by a hurricane. In no event will the deductible applied for a hurricane loss be less than the property deductible shown on the Coverage Summary.
>
> Hurricane means wind, wind gust, hail, rain, tornado, cyclone or hurricane which results in direct physical loss or damage to property by a storm system that has been declared to be a hurricane by the National Weather Service. . . .
>
> . . . .
>
> All other provisions of this policy apply.

The plaintiffs assert that in light of this language, a reasonable policyholder would have expected the water damage in this case to be covered. Humphreys goes a step further and argues that the hurricane-deductible endorsement in her policy actually expands coverage to extend to any property damage caused by a hurricane.

But the plain language of the hurricane-deductible endorsements indicates that they do nothing more than alter the deductible for damage caused by a hurricane. Nothing in the language of the endorsements purports to extend coverage for floods or to restrict flood exclusions; indeed they do not even include flood or water (other than rain) in the definition of "hurricane." Further, the endorsements state that all other provisions of the policies apply, indicating that the flood exclusions remain in effect.

The hurricane-deductible endorsements therefore would not give a reasonable policyholder the impression that flood resulting from a breached levee would be covered.

Finally, several defendants[26] argue that in light of flood insurance available though the National Flood Insurance Program ("NFIP"), a reasonable policyholder would not expect homeowners policies to cover the flooding in this case. The defendants assert that we may consider the NFIP in interpreting "flood" because custom and industry usage is relevant under article 2053 of the Civil Code. They contend that the NFIP's existence over many years has made it clear to property owners that standard all-risk policies do not cover flood damage, regardless of whether the cause of the flood is natural or non-natural, and that property owners who want flood coverage must purchase it through the NFIP; a reasonable policyholder thus would not expect the inundation of water in this case to be covered under a standard homeowners, renters, or commercial-property insurance policy.

The plaintiffs, in contrast, urge us not to consider the NFIP, contending that it has no bearing on this appeal. And to the extent the NFIP may be relevant, the plaintiffs argue that a reasonable policyholder would expect the NFIP to provide coverage for naturally occurring floods but that floods induced by negligence would be covered under standard all-risk policies.

We do not rely upon the NFIP to decide this appeal. Our decision is based instead upon our determination that the flood exclusions in the policies

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[26] Specifically, Standard, Hanover, Great Northern, and the ISO Defendants make this argument.

before us unambiguously preclude the plaintiffs' recovery. But to the extent that the NFIP's definition of "flood" is further evidence of the term's generally prevailing meaning, we note that it is consistent with our interpretation. Standard insurance policies issued under the NFIP define "flood" as follows:

> A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is [the policyholder's] property) from:
>
> a. Overflow of inland or tidal waters,
>
> b. Unusual and rapid accumulation or runoff of surface waters from any source,
>
> c. Mudflow.

44 C.F.R. Pt. 61, App. A(1), App. A(2), App. A(3) (2006); *see also* Federal Emergency Management Agency, FloodSmart.gov: What is a Flood?, http://www. floodsmart.gov/floodsmart/pages/whatflood.jsp (last visited July 25, 2007), The NFIP makes no distinction between inundations of water caused by natural levee ruptures and those caused by man-made ruptures (even if such a distinction were workable). The canals' overflowing into the City of New Orleans due to the levee ruptures was certainly an overflow of inland waters as used in the NFIP's definition, and it may also have been an unusual and rapid runoff of surface waters.

In sum, we conclude that the flood exclusions in the plaintiffs' policies are unambiguous in the context of the facts of this case. In the midst of a hurricane, three canals running through the City of New Orleans overflowed their normal boundaries. The

flood-control measures, i.e., levees, that man had put in place to prevent the canals' floodwaters from reaching the city failed. The result was an enormous and devastating inundation of water into the city, damaging the plaintiffs' property. This event was a "flood" within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs' all-risk policies, and the district court's conclusion to the contrary was erroneous.[27]

C. Efficient Proximate Cause and Anti-Concurrent-Causation Clauses

Lastly we turn to the doctrine of efficient proximate cause. Under this doctrine, as it is applied in many jurisdictions, where a loss is caused by a combination of a covered risk and an excluded risk, the loss is covered if the covered risk was the efficient proximate cause of the loss.[28] *See, e.g., Chadwick*

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[27] Because we reach this conclusion, we need not address the issue raised in the cross-appeals of the impact of the "lead-in" language in the State Farm policies.

[28] To our knowledge, the Louisiana Supreme Court has not addressed the applicability of the efficient-proximate-cause doctrine in the context of an all-risk policy. But it has concluded in the context of interpreting a windstorm insurance policy (which provided coverage only for loss caused by windstorm) that "if a windstorm is the dominant and efficient cause of the loss, the insured may recover notwithstanding that another cause or causes contributed to the damage suffered." *Lorio v. Aetna Ins. Co.*, 232 So. 2d 490, 493 (La. 1970); *see also Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v Continental Ins. Co. of N.Y.*, 112 So. 2d 680, 683 (La. 1959) (Tit is sufficient, in order to recover upon a windstorm insurance policy not otherwise limited or defined, that the wind was the proximate or efficient cause of the loss or damage, notwithstanding

v. Fire Ins. Exch., 21 Cal. Rptr. 2d 871, 873 (Cal. Ct. App. 1993); *Kish v. Ins. Co. of N. Am.*, 883 P.2d 308, 311 (Wash. 1994); *see also* COUCH, *supra*, at §§ 101:43:45, :53-:55. The efficient proximate cause of the loss is the dominant, fundamental cause or the cause that set the chain of events in motion. *See* COUCH, *supra*, at § 101:45.

Many of the insurance policies at issue in this appeal excluded "loss caused directly or indirectly by" flood "regardless of any other cause or event contributing concurrently or in any sequence to the loss." This language, which the district court referred to as an anti-concurrent-causation clause, has been recognized as demonstrating an insurer's intent to contract around the operation of the efficient-proximate-cause rule. *See, e.g., TNT Speed & Sport Ctr., Inc. v. Am. States Ins. Co.*, 114 F.3d 731, 732-33 (8th Cir. 1997).

The district court considered the anti-concurrent-causation clauses in this case and concluded that they are inapplicable here because there were not two separate causes of the plaintiffs' damage. The court remarked that this case does not present a combination of forces that caused damage and that it therefore is not analogous to cases where Hurricane Katrina may have damaged property through both wind and water. *Cf. Tuepker v. State Farm Fire & Cas. Co.*, 2006 U.S. Dist. LEXIS 34710 (S.D. Miss. May 24, 2006) (unpublished opinion) (Hurricane Katrina case involving alleged damage from wind,

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other factors contributing thereto."). We express no opinion on the extent to which Louisiana follows the efficient-proximate-cause rule in the context of all-risk policies because we conclude that the rule is inapplicable to this case.

rain, and storm surge), *appeal docketed*, Nos. 06-61075 & 06-61076 (5th Cir.). Instead, the court stated that "in this case the 'cause' conflates to the flood," meaning that the alleged negligent design, construction, or maintenance of the levees and the resulting flood were not separate causes of the plaintiffs' losses. Consequently, the court concluded that the anti-concurrent-causation clauses needed not be addressed at that time but stated that they may need to be addressed at later stages in the litigation.

On appeal, several insurers rely in part on the language in their anticoncurrent-causation clauses to demonstrate that floods are excluded regardless of the cause. The *Chehardy* plaintiffs respond that "the District Court correctly determined that the anti-concurrent causation clauses were inapplicable," contending that the cause of their damage ("man-made inundation of water or inundation resulting from third-party negligent acts") was a covered peril.[29] Xavier responds that the district court "correctly noted that [the anti-concurrentcausation clause] is inapplicable because there is no separate or other cause of damage."

We agree with the district court's determination that we need not address whether insurers may contract around the efficient-proximate-cause rule under Louisiana law, nor need we address the operation of the efficient-proximatecause rule itself in this case. The efficient-proximate-cause doctrine applies only where two or more distinct actions, events, or forces combined to create the loss. *See Pieper v. Commercial Underwriters Ins. Co.*, 69 Cal. Rptr. 2d

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[29] The *Vanderbrook* plaintiffs and Humphreys adopted the *Chehardy* plaintiffs' arguments.

551, 557 (Cal. Ct. App. 1997) ("For the efficient proximate cause theory to apply, . . . there must be two separate or distinct perils . . . ."); *Kish*, 883 P.2d at 311 ("The efficient proximate cause rule applies only where two or more independent forces operate to cause the loss."). But here, on these pleadings, there are not two independent causes of the plaintiffs' damages at play; the only force that damaged the plaintiffs' properties was flood. To the extent that negligent design, construction, or maintenance of the levees contributed to the plaintiffs' losses, it was only one factor in bringing about the flood; the peril of negligence did not act, apart from flood, to bring about damage to the insureds' properties. Consequently, as the plaintiffs argue and as the district court held, the efficient-proximate-cause doctrine is inapplicable. *See Chadwick*, 21 Cal. Rptr. 2d at 1117 ("When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application."); *see also Cornhusker Cas. Co. v. Farmers Mut. Ins. Co.*, 680 N.W.2d 595, 601-02 (Neb. 2004); Kish, 883 P.2d at 311.

Moreover, to the extent that the plaintiffs do attempt to recharacterize the cause of their losses by focusing on negligence as the cause rather than water damage, their argument fails. "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." *Kish*, 883 P.2d at 311; *Chadwick*, 21 Cal. Rptr. 2d at 874. "If every possible characterization of an action or event were counted an additional peril, the exclusions in all-risk insurance contracts would be largely meaningless." *Chadwick*, 21 Cal. Rptr. 2d at 874. Thus, in *Pieper v.*

Commercial Underwriters Insurance Co., where a policy covered loss caused by arson but excluded loss caused by brush fire, a brush fire caused by arson was excluded, 69 Cal. Rptr. 2d at 557-58. The *Pieper* court determined that the cause of the brush fire was irrelevant; the plaintiffs' property was damaged by one cause alone, brush fire, and thus, the efficient-proximate-cause rule was inapplicable. *Id.* And in *Kish v. Insurance Co. of North America*, where a policy covered loss caused by rain but excluded loss caused by flood, the court held that the insured could not avoid the operation of the flood exclusion by merely recharacterizing the flood as rain. 883 P.2d at 311-13. The court held that there was one cause of the plaintiffs' loss—rain-induced flood—which was excluded, and concluded that the efficient-proximate-cause rule was inapplicable. *Id.* We similarly reject any attempt on the plaintiffs' part to avoid the operation of the flood exclusion by recharacterizing the flood as negligence; the sole cause of the losses for which they seek coverage in this litigation, flood, was excluded from coverage regardless of what factors contributed to its development.

In sum, we need not address the applicability of anti-concurrent-causation clauses or the efficient-proximate-cause rule because, as pleaded, there was not more than one separate cause of the plaintiffs' losses. As the district court recognized, there are other cases arising in the context of Hurricane Katrina where these issues may come into play, but this is not the case for their resolution.

IV. CONCLUSION

With respect to the *Vanderbrook* action, the district court's grant of State Farm's motion for judgment on the pleadings is AFFIRMED. The denial of the mo-

tions for judgment on the pleadings filed by Hanover and Standard Fire is VACATED and REMANDED.

With respect to the *Xavier* action, the motion to certify questions to the Louisiana Supreme Court is DENIED. The district court's grant of partial summary judgment in favor of Xavier is VACATED and REMANDED.

With respect to the *Chehardy* action, the motion to certify questions to the Louisiana Supreme Court is DENIED. The district court's grant in part of State Farm's motion to dismiss is AFFIRMED. And the denial of the motions to dismiss filed by Lafayette, Liberty Mutual, American, Auto Club, Standard Fire, Lexington, Aegis, Hanover, Allstate, Louisiana Citizens, Encompass Insurance, and Great Northern pertaining to the claims for declaratory judgment and breach of contract is VACATED and REMANDED.

With respect to the *Humphreys* action, the district court's denial of Humphreys's partial-summary-judgment motion on the question of coverage under the policy's hurricane-deductible endorsement is AFFIRMED. The grant of partial summary judgment in Humphreys's favor on the question of the interpretation of the policy's flood exclusion is VACATED and REMANDED.

Motions DENIED; AFFIRMED in part, VACATED in part, and REMANDED for further proceedings consistent with this opinion. The appellees shall bear the cost of this appeal.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed AUG 27, 2007]

No. 07-30119

IN RE: KATRINA CANAL
BREACHES LITIGATION

RICHARD VANDERBROOK; MARY JANE SILVA; JAMES CAPELLA; MADELINE GRENIER, misidentified as Sophia Grapier; JACK CAPELLA, as the Executor of the Succession of Lilian Capella; GREGORY JACKSON; PETER ASCANI, III; ROBERT G HARVEY, SR.
Plaintiffs - Appellees - Cross-Appellants,

v.

UNITRIN PREFERRED INSURANCE COMPANY;
HANOVER INSURANCE COMPANY;
STANDARD FIRE INSURANCE COMPANY,
Defendants – Appellants,

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant - Cross-Appellee.

KELLY A HUMPHREYS,
Plaintiff - Appellee - Cross-Appellant,

v.

ENCOMPASS INDEMNITY COMPANY,
Defendant - Appellant - Cross-Appellee.

XAVIER UNIVERSITY OF LOUISIANA,
Plaintiff – Appellee,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,
Defendant – Appellant.

GLADYS CHEHARDY; DANIEL FONTANEZ; JACQUELYN FONTANEZ; LARRY FORSTER; GLENDY FORSTER; *et al.*,
Plaintiffs - Appellees - Cross-Appellants,

v.

ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; AMERICAN INSURANCE COMPANY; AEGIS SECURITY INSURANCE COMPANY; LAFAYETTE INSURANCE COMPANY; LIBERTY MUTUAL FIRE INSURANCE COMPANY; AAA HOMEOWNERS AUTO CLUB FAMILY INSURANCE COMPANY; LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION; LEXINGTON INSURANCE COMPANY; ENCOMPASS INSURANCE COMPANY OF AMERICA; GREAT NORTHERN INSURANCE COMPANY; HANOVER INSURANCE COMPANY; STANDARD FIRE INSURANCE COMPANY,
Defendants – Appellants,

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant - Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITIONS FOR REHEARING EN BANC

(Opinion 08/02/07, 5 Cir., ____, ____ F.3d ____)

Before KING, DeMOSS, and OWEN, *Circuit Judges*.

PER CURIAM:

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel not judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions,- for-. Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn D. King
CAROLYN D. KING
United States Circuit Judge

Judges Wiener, Dennis, and Clement did not participate in the consideration of the rehearing en bane.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30119

In Re: Katrina Canal Breaches Consolidation
Litigation Pertains To: Insurance
Xavier University, No. 06-516

XAVIER UNIVERSITY OF LOUISIANA,
Plaintiff-Appellee,

VERSUS

TRAVELERS CASUALTY PROPERTY COMPANY
OF AMERICA,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Louisiana
No. 05-4182

MOTION TO CERTIFY QUESTION TO THE
LOUISIANA SUPREME COURT

Plaintiff-Appelle Xavier University of Louisiana ("Xavier") respectfully submits this Motion to Certify Question to the Louisiana Supreme Court.[1] As will be set forth below, the issue on appeal concerns the proper interpretation of a purported "water damage" exclusion contained in policies of insurance issued to

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[1] In accordance with Local Rule 27.4, Xavier notes that it has contacted counsel for defendant-appellant, Travelers, who has indicated that he objects to the filing of this motion.

Xavier and the other insureds in this matter. Louisiana law governs this issue. It is beyond dispute that the Louisiana Supreme Court has not issued any opinion concerning the proper interpretation of this exclusion. Moreover, this matter is of utmost concern the citizens of Louisiana and the insurance companies doing business in this state. Thus, this Court has authority to certify the question of the interpretation of this provision to the Louisiana Supreme Court.

I. FACTS AND PROCEDURAL HISTORY

The sole issue on appeal to this Court is the proper interpretation of the appellants' "water damage exclusions" contained in the policies of insurance issued to the insureds. Specifically, this Court must consider whether the term "flood" as found in the policy of insurance issued by defendant-appellant Travelers Property Casualty Company of America ("Travelers") is limited solely to naturally occurring events and that, where the damages result from a man-made cause, the policy provides coverage.

Travelers has appealed from the District Court's November 27, 2006 Order granting, in part, partial summary judgment in favor of Xavier that the "water damage" exclusion was ambiguous as a matter of law. A copy of this Order is attached hereto as Exhibit 1. At the outset of its opinion, the District Court noted that it was sitting in diversity and would apply Louisiana law to the issue at bar pursuant to the mandates of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938). Exhibit A at 4-5. Applying Louisiana principles of insurance policy interpretation, the Court concluded that the "water damage" exclusion contained in Travelers' policy "does not clearly ad-

dress flooding caused by man-induced causes and as such, the Court must find coverage." *Id.* at 58.

The District Court concluded its analysis by certifying its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), upon finding that the issues involved "a controlling question of law as to which there is a substantial ground for difference of opinion . . ." *Id.* at 85. The District Court further made the following statement with regard to further review of its rulings:

> The Court notes that if it had the power under Rule XII of the Rules of the Louisiana Supreme Court to certify the issues decided herein to that court, it would have done so, *since there are no clear controlling precedents of the Louisiana Supreme Court on same and the issues presented and decided herein are significant and require an application of Louisiana law.*

Id. (emphasis added).

This Court granted Travelers' request for permission to appeal and has docketed the present appeal. Xavier now respectfully moves this Court to follow the District Court's suggestion and certify this matter to the Louisiana Supreme Court for ultimate resolution.

II. LAW AND ANALYSIS

A. RULE XII OF THE LOUISIANA SUPREME COURT GRANTS THIS COURT THE AUTHORITY TO CERTIFY ISSUES OF STATE LAW FOR ULTIMATE RESOLUTION.

Rule XII of the Louisiana Supreme Court provides the basis for this Court to certify issues of state law to it for ultimate resolution; it provides:

> When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it *questions of propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state,* such federal court before rending a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it.

LA. SUP. CT. R. XII(1) (emphasis added).

This Court has, on several occasions, recognized that certification was appropriate where the Louisiana Supreme Court had not previously considered the issue and the issues on appeal were of great importance to the citizens or industry of the state. For example, in *Frey v. Amoco Production Co.*, 951 F.2d 67 (5th Cir. 1992), this Court noted that the Louisiana Supreme Court had never previously

considered the meaning of a disputed provision for royalties in a mineral. *See id.* at 67. The Court granted a request to certify the question to the Louisiana Supreme Court noting that "this suit carries tremendous consequences for Louisiana's gas industry and its citizens who own mineral interests in Louisiana real estate." *Id.* Accordingly, the Louisiana Supreme Court was the "appropriate authority" to resolve the dispute on appeal. *Id.*

This Court confronted a similar issue in *Jesco Construction Corp. v. Nationsbank Corp.*, 278 F.3d 444 (5th Cir. 2001). There, the issue on appeal was the interpretation of the Louisiana Credit Agreement Statute and whether it precluded certain types of actions. *Id.* at 448. The court noted that this was an important question and had "widespread ramifications" for the banking industry in Louisiana, and, thus, the Court felt that "the issue presented is of such importance that we should refrain from making an '*Erie* guess' as to how the Louisiana Supreme Court might rule, and instead should request binding advise from that court through the certification process." *Id.*

B. IN THE SAME MANNER AS THE *FREY* AND *JESCO* COURTS CERTIFIED THEIR RESPECTIVE ISSUES TO THE LOUISIANA SUPREME COURT, THIS COURT SHOULD DO LIKEWISE IN THIS CASE.

As the District Court properly noted in its November 27, 2006 Order, there is no clear ruling from the Louisiana Supreme Court on the proper interpretation of a purported "flood" exclusion. Moreover, the ultimate outcome of any ruling in this case would have significant implications for a large number of the citizens of southeast Louisiana and the

insurance industry in this state. In addition to the significant litigation pending before the United States District Court of the Eastern District of Louisiana, the issue of the flood exclusion will undoubtedly be presented to the state courts in Louisiana. Indeed, several state district courts have already issued rulings regarding interpretation of purported "flood" exclusions similar to the one contained in the Travelers policy that is at issue in the present appeal. *See* Exhibit 2, February 9, 2007 Judgment, *Joseph Sher v. Lafayette Ins. Co., et al.*, No. 06-9276, Div. G-11, Civil District Court, Parish of Orleans, State of Louisiana; Exhibit 3, December 5, 2006, Judgment and Reasons for Judgment, *Historic Restoration Inc. v. RSUI Indemnity Co., et al*, No. 06-4990, Div. D, Civil District Court, Parish of Orleans, State of Louisiana. It is very likely that these rulings will be appealed to the Louisiana state circuit courts of appeal and, possibly, to the Louisiana Supreme Court. Thus, to ensure a uniformity of decisions regarding this important issue, certification is proper.

III. CONCLUSION

For the foregoing reasons, Xavier respectfully requests that this Honorable Court grant its motion and certify the following question for determination by the Louisiana Supreme Court:

> Is the term "flood" as contained in the "water damage" exclusion in the all risks policies at issue ambiguous and, thus, limited to exclude only damages caused by natural occurrences and not man-made occurrences?

Respectfully Submitted:

/s/ James M. Garner

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30119

In Re: Katrina Canal Breaches Consolidation
Litigation Pertains To: Insurance
Xavier University, No. 06-516

XAVIER UNIVERSITY OF LOUISIANA,
Plaintiff-Appellee,

VERSUS

TRAVELERS CASUALTY PROPERTY COMPANY
OF AMERICA,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Louisiana
No. 05-4182

REPLY MEMORANDUM TO APPELLANT'S
OPPOSITION TO MOTION TO CERTIFY
QUESTION TO THE LOUISIANA
SUPREME COURT

JAMES M. GARNER, #19589
DARNELL BLUDWORTH, #18801
KEVIN M. MCGLONE, #21845
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Attorneys for Plaintiff-Appellee
Xavier University of Louisiana

* * * *

Plaintiff-Appellant, Xavier University of Louisiana ("Xavier") submits this Reply Memorandum to the the Opposition to Xavier's Motion to Certify Question to the Louisiana Supreme Court filed by Defendant-Appellee Travelers Property Casualty Company of America ("Travelers"). For the following reasons, Travelers fails to demonstrate that the proper interpretation of the purported "water damage" exclusion is not a matter for consideration by the Louisiana Supreme Court and that this Court should not exercise its discretion to so certify.

I. XAVIER DOES NOT SEEK CERTIFICATION SOLELY BECAUSE THE LOUISIANA SUPREME COURT HAS NEVER RENDERED AN OPINION ON THE PROPER INTERPRETATION OF THE WATER DAMAGE EXCLUSION.

Travelers asks this Court to decline certification because, it argues, the applicable principles of state law are clear. Further, Travelers contends that certification should not depend solely on the question of whether the Louisiana Supreme Court has provided a definitive answer to the question. Indeed, Travelers selectively quotes from this Court's decision in *Jefferson v. Lead Industries Association, Inc.*, 106 F.3d 1245 (5th Cir. 1997). This Court stated: "*Alone*, the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification." *Id.* at 1247 (emphasis added). Xavier has not suggested to this Court that certification is appropriate solely because the Louisiana Supreme Court has not considered whether the term "flood" applies solely to naturally occurring events.

Rather, relying on this Court's decisions in *Frey v. Amoco Production Co.*, 951 F.2d 67 (5th Cir. 1992) and *Jesco Construction Corp. v. Nationsbank Corp.*, 278 F.3d 444 (5th Cir. 2001), Xavier contends certification is appropriate not only where there was no clear answer from the Louisiana Supreme Court but also where the issue presented was of tre mendous consequence to the state, its citizens, and industries. *See* Xavier's Motion to Certify Question to Louisiana Supreme Court at 4-5. As the *Jesco* Court noted, certification is appropriate where the issue has "widespread ramifications" for a "particular industry" and the "issue is of such importance" that this Court should defer ruling pending a binding decision from the Louisiana Supreme Court. *See Jesco Constr. Corp.*, 278 F.3d at 448.

Further, Travelers' attempt to distinguish *Frey* and *Jesco Construction Corp.* ultimately reveals distinctions without any real difference to the issue presented in the present appeal. Admittedly, the procedural history by which *Frey* reached the Louisiana Supreme Court was unusual, as the issue was certified by a panel of this Court considering a petition for rehearing after having already rendered its decision. *See Frey*, 951 F.2d at 67. Most certifications will not have the benefit of the appellate court's consideration of the issue, but this is hardly a basis to refuse certification in this case. Additionally, Xavier submits that lesson of *Frey* is that this Court could and should avoid having to reach the merits of this appeal where the issue presented is of great importance to the state of Louisiana, its citizens, and the state's insurance industry.

Travelers' effort to distinguish *Jesco Construction Corp.* is similarly unavailing. Questions of certi-

fication to the Louisiana Supreme Court are not confined only to instances where there is a split among the state appellate courts. If the *Jesco Construction Corp.* Court had chosen not to certify the issue before it to the Louisiana Supreme Court, it would have at least have had the opportunity of state intermediate courts' opinions to resolve the dispute. In the present case, there is a no Louisiana appellate decision considering whether the term "flood" in a water damage exclusion is limited solely to naturally occurring events. Given the lack of any authority, certification is appropriate in this case. As demonstrated above, Xavier seeks certification for reasons more than just a lack of a definitive answer from the Louisiana Supreme Court on the proper interpretation of the water damage exclusion.

The facts warranting certification in *Frey* and *Jesco* stand in stark contrast to those facts that led this Court to deny certification in *Jefferson*, *supra*, a case Travelers cites several times in its opposition to Xavier's motion. The *Jefferson* Court noted that certification was inappropriate, in part, because this Court's own precedent had already considered the issue on appeal and the Louisiana legislature had not amended the law in any manner such that a reversal of precedent was warranted. *See Jefferson*, 106 F.3d at 1247-48 & n.9. In contrast, this Court has not addressed the proper interpretation of the water damage exclusion under Louisiana law, and Xavier urges this Court to defer its decision to the Louisiana Supreme Court given the important magnitude of this issue.

II. XAVIER'S CHOICE OF A FEDERAL FORM SHOULD NOT MITIGATE AGAINST CERTIFICATION AS IT IS NOT SEEKING A "SECOND BITE AT THE APPLE" BY ASKING TO GO BACK TO STATE COURT.

Travelers also argues that certification should be denied because Xavier has invoked the jurisdiction of the federal courts and should not be permitted to go back to a state court because doing so would amount to judicial forum shopping. That Xavier initiated this litigation in a federal forum is of no moment to the present appeal. Those courts refusing certification on because of a litigant's choice of a federal form basis did so where the *appellant* was the party who had invoked federal court jurisdiction and sought a different result from the state court. This was the factual scenario before the Court in *Jefferson* and the cases on which it relies for denying certification based on the appellants' invocation of federal jurisdiction. *See Jefferson*, 106 F.3d at 1248 & n.10 *See also Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) (declining certification, in part, because the appellants "chose to litigate these claims before the district court, fully aware that neither of the relevant jurisdictions recognize the theories they were advancing."); *Nat'l Bank v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988) (refusing certification where the appellant had removed the matter to federal court after an adverse ruling of the state court that he sought reconsideration of in federal court and on appeal).

In the present appeal, Xavier does not seek a "second bite at the apple" because it failed to obtain a desired result in the District Court. Rather, Xavier moves for certification so that this important issue

may be decided by the Louisiana Supreme Court and provide some finality to the issues surrounding the proper interpretation of the water damage exclusion and avoid potentially inconsistent rulings in the state and federal courts.

III. THAT LOUISIANA'S PRINCIPLES OF INSURANCE INTERPRETATION ARE WELL SETTLED IS NOT A SUFFICIENT BASIS FOR THIS COURT TO REFUSE CERTIFICATION BECAUSE THE INTERPRETATION OF THE WATER DAMAGE EXCLUSION HAS NOT BEEN CONSIDERED BY AN APPELLATE COURT IN THIS STATE.

Travelers insists that certification should not go forward because Louisiana's rules concerning insurance policy interpretation are well-established. The issue on appeal concerns the application of those rules, and certification should be allowed considering the unique and significant facts of this case. Travelers cites *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429 (7th Cir. 1992), for the proposition that certification is inappropriate where there are well-settled principles of state law in place to allow for the court to reach the issue on appeal. The issue, however, in *Woodbridge Place* involved interpretation of a contractual provision in a negotiated agreement between the two parties; the court gave the following explanation for declining certification:

> This court has been especially willing to certify questions when the issue before this court is one of first impression. Nonetheless, fact specific, particularized decisions that lack broad, general significance are not suitable for certification to a

> state's highest court. This case requires the interpretation of a contract. Courts must look to the particularized language before it and the particularized negotiations between the parties in construing contractual documents. Cases involving the interpretation of contractual documents are, therefore, by nature particularized inquiries. For this reason, it is often difficult to discern any generalized principals from such cases—a fact demonstrated by the case before us today.

Id. at 1434.

The matter before this Court involves an insurance policy, not a carefully negotiated contract. Not even Travelers can argue that the issue before this Court lacks a "broad, general significance" or that the issues on appeal present a "particularized inquiry." Indeed, the manner in which Travelers' appeal has been consolidated with the other water damage-related appeals suggests the opposite. This is a matter of great importance, and the ultimate decision regarding interpretation of the water damage exclusion will be applicable to all claims consolidated for consideration by the District Court. Thus, the *Woodbridge Place* Court's rationale actually militates in favor of certification.

IV. VARIOUS UNITED STATES CIRCUIT COURTS OF APPEAL HAVE CERTIFIED ISSUES OF INSURANCE POLICY INTERPRETATION TO A STATE COURT OF LAST RESORT.

Contrary to Travelers' arguments, various United States Circuit Courts of Appeals have certified issues of insurance policy interpretation to a given state's

highest court despite the fact that the guiding principles of insurance policy interpretation in those states are presumably as well settled as Louisiana's insurance law. For example, in *Northfield Insurance Co. v. Derma Clinic Inc.*, 440 F.3d 86 (2nd Cir. 2006), the United States Court of Appeals for the Second Circuit certified issues concerning the interpretation of Connecticut contract and insurance law to the highest court of that state. *Id.* at 88.

In *City of Burlington v. Indemnity Insurance Company of North America*, 332 F.3d 38 (2d Cir. 2003), the Second Circuit also found certification appropriate regarding the interpretation of an "all risks" policy and an exclusion contained therein issued in Vermont. *See id.* at 50. The court specifically noted that the issue before it "involves significant assumptions about how Vermont law interprets all-risk insurance policies. Because these assumptions implicate important policy considerations, the determination of which lies within the province of Vermont and its courts, we deem it prudent respectfully to certify" certain issues to the court." *Id.* Finally, in *Rubin v. State Farm Mutual Automobile Insurance Co.*, 222 F.3d 750 (9th Cir. 2000), the Ninth Circuit Court of Appeals certified an issue of policy interpretation to the Nevada Supreme Court for decision.

As these cases demonstrate, there is precedent for this Court to certify an issue of insurance policy interpretation to the Louisiana Supreme Court. That the guiding principles of insurance law are well settled, it is the application of those principles that is not. The issues raised in the present appeal contain compelling and important issues that will affect the citizens and insurance industry in Louisiana. Xavier respectfully requests that this Honorable Court

certify this appeal to the Louisiana Supreme Court for ultimate resolution.

V. CONCLUSION

For the foregoing reasons, Xavier respectfully requests that this Honorable Court grant its motion and certify the following question for determination by the Louisiana Supreme Court:

> Is the term "flood" as contained in the "water damage" exclusion in the all risks policies at issue ambiguous and, thus, limited to exclude only damages caused by natural occurrences and not man-made occurrences?

Respectfully Submitted:

/s/ James M. Garner

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APPELLEE XAVIER
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APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30119

XAVIER UNIVERSITY OF LOUISIANA,
Plaintiff-Appellee,

VERSUS

TRAVELERS CASUALTY PROPERTY COMPANY
OF AMERICA,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Louisiana
No. 05-4182
Hon. Stanwood R. Duval, Jr.

In Re: Katrina Canal Breaches Consolidation
Litigation Pertains To: Insurance
Xavier University, No. 06-516

PETITION FOR EN BANC REHEARING
OF PLAINTIFF-APPELLEE
XAVIER UNIVERSITY OF LOUISIANA

JAMES M. GARNER, #19589
DARNELL BLUDWORTH, #18801
TIMOTHY B. FRANCIS #14973
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CERTIFICATE OF INTERESTED PERSONS

(1) In Re: Katrina Canal reaches consolidated Litigation No. 05-4182. Pertains to: Insurance (Xavier, No. 06-516)

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs:

1. Gladys Chehardy
2. Daniel Fontanez
3. Jacqueline Fontanez
4. Larry Forster
5. Glendy Forster
6. Kenneth Maier
7. Judith Maier
8. Randy Gervais
9. Lori Gervais
10. Andre Mauberret
11. Marlin Mauberret
12. Debbie Strawn
13. Dave Strawn
14. Stephanie Boyd
15. Brad Boyd
16. New Orleans Flooring Supply, Inc.
17. Shawn Burst
18. Angelina Burst
19. Susan Brown (misidentified as Patricia Brown in Amended Complaint)
20. Marie Fatheree
21. Katrina Daniels
22. Lionel Jones

23. Edna Jones
24. Karen Lewis
25. Shane Sylvester
26. Austra Zapata
27. Sabrina Perkins
28. Eldridge Pollard
29. Michael Peterson
30. Wendell Glation
31. Mack Barham
32. Richard Vanderbrook
33. Mary Jane Silva
34. Madeline Grenier
35. James Capella
36. Jack Capella, Executor of the Succession of Lilian Cappella
37. Gregory Jackson
38. Peter Ascani, III
39. Robert G. Harvey, Sr.
40. Xavier University of Louisiana
41. Kelly A. Humphreys

Counsel for Plaintiffs:

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192. Freedomworks
193. Hailey, McNamara, Hall, Larmann & Papale
194. Horace Mann Insurance Company
195. Keogh, Cox & Wilson, Ltd.
196. Larzelere Picou Wells Simpson & Lonero
197. National Association of Mutual Insurance Co.
198. Property Casualty Insurers Association of America
199. Reinsurance Association of America
200. Republic Fire & Casualty Insurance Co.
201. Skadden, Arps, Slate, Meagher & Flom
202. United Services Automobile Association
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District Court Judge Rendering Decision Below:

204. Honorable Stanwood R. Duval, Jr., U.S. District Court for the Eastern District of Louisiana

/s/ James M. Garner

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STATEMENT OF BASES FOR EN BANC REHEARING

Plaintiff-Appellee Xavier University of Louisiana ("Xavier") submits that this matter is appropriate for en banc rehearing for the following reasons:

1. The decision reached by the panel conflicts with this Honorable Court's decision in *Peach State Uniform Service, Inc. v. American Ins. Co.*, 507 F.2d 996 (5th Cir. 1975), in that the Peach State Court specifically held that whether the cause of a loss is natural or man-made is relevant to insurance coverage while the panel decision rejects the distinction between man-made and natural causes of loss.

2. This case involves a question of exceptional importance in that the decision will financially impact every person whose home or business was inundated by water from the levees that broke after Katrina. As such the decision will impact hundreds of thousand of homeowners and business owners.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS ..

STATEMENT OF BASES FOR EN BANC REHEARING .....

TABLE OF AUTHORITIES .....

STATEMENT OF ISSUES MERITING EN BANC REHEARING .....

STATEMENT OF THE CASE .....

STATEMENT OF FACTS .....

ARGUMENT .....

I. THE PANEL ERRED IN REFUSING TO CERTIFY THE ISSUE OF THE AMBIGUITY OF THE "FLOOD" EXCLUSION TO THE LOUISIANA SUPREME COURT .....

II. THE PANEL INCORRECTLY REFUSED TO DISTINGUISH BETWEEN MAN-MADE AND NATURAL CAUSES, IN DIRECT CONTRADICTION OF THIS COURT'S RULING IN PEACH STATE .....

III. THE PANEL ERRED IN IGNORING THE DOERR DECISION, WHICH IS INSTRUCTIVE IN EXPLAINING LOUISIANA LAW CONCERNING WHEN AN INSURANCE POLICY IS AMBIGUOUS .....

TABLE OF CONTENTS—Continued

Page

IV. THE PANEL BASED ITS OPINION ON THE INCORRECT FACTUAL ASSUMPTION THAT THE DRAINAGE CANALS AT ISSUE "OVERFLOWED THEIR NORMAL BOUNDARIES"" .....

CONCLUSION .....

CERTIFICATE OF SERVICE.....

TABLE OF AUTHORITIES

CASES Page

Broussard v. Southern Pacific Transportation 665 F.2d 1387 (5th Cir. 1982) .....
Change, Inc. v. Westfield Insurance Co., 542 S.E.2d 475 (W. Va. 2000) .....
Doerr v. Mobil Oil Corp. 774 So. 2d 119 (La. 2000) .....
Ebbing v. State Farm Fire & Casualty Co., 1 S.W.3d 459 (Ark. Ct. App. 1999) .....
Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc., 55 F.3d 181 (5th Cir. 1995) .....
Historic Restoration Incorporated, et al v. RSUI Indemnity Co. & Essex Ins. Co., Civil District Court, Orleans Parish, No. 06-4990, Div. D-16 .....
In re Katrina Canal Breaches, 466 F.Supp. 729 (E.D. La. 2006) .....
League of United Latin American Citizens v. Clements, 914 F.2d 620 (5th Cir. 1990) .....
Mateer v. Reliance Ins. Co. 233 A.2d 797 (Ma. Ct. App. 1967) .....
Onebeacon Insurance Co. v. Don's Building Supply, Inc. No. 06-10727 (5th Cir. August 8, 2007) .....
Peach State Uniform Service, Inc. v. American Ins. Co., 507 F.2d 996 (5th Cir. 1975) .....
Perkins v. Entergy Corp., 782 So.2d 606, 610-611 (La. 2011) .....
Popkin v. Security Mutual Insurance Co. of New York, 367 N.Y.S.2d 492 (N.Y. App. Div. 1975) .....

TABLE OF AUTHORITIES—Continued

Page

Pruitt v. Levi Strauss & Co., 932 F.2d 458, (5th Cir. 1991) .....
Sher v. Lafayette Ins. Co., et al., Civil District Court, Orleans Parish, Div. G-11, No. 06-9276 .....
White III, L.L. C. v. Travelers Property Casualty of America, Civil District Court, Orleans Parish, Div. G-11, No. 06-09607 .....
White v. Louisiana Citizens Prop. Ins. Corp., Civil District Court, Orleans Parish, Div. K-5 No. 06-7975.....

RULES AND STATUTES

La. Civ. Code art. 2046.....
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STATEMENT OF ISSUES MERITING EN BANC REHEARING

1. Whether the panel erred in refusing to certify this matter to the Louisiana Supreme Court given that it is a far-reaching issue that concerns Louisiana law and given that there are contradictory rulings from Louisiana State courts and this Court.

2. Whether the panel erred in failing to follow *Peach State Uniform Service, Inc. v. American Ins. Co.*, 507 F.2d 996 (5th Cir. 1975), which held that an insurance policy exclusion that failed to distinguish between natural and man-made causes was ambiguous.

3. Whether the panel erred in failing to consider the Louisiana Supreme Court decision of *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119 (La. 2000), which is that Court's most recent pronouncement of the proper standards for insurance policy interpretation.

4. Whether the panel made an incorrect factual assumption—that the involved canals were overtopped—in reaching its decision.

STATEMENT OF THE CASE

Xavier filed a motion for partial summary judgment regarding the interpretation of the water damage exclusion, contending that the term "flood" is ambiguous and applies only to naturally occurring events. On November 27, 2006, the district court granted Xavier's motion in part, holding that the purported "flood" exclusion was ambiguous.[1] The district court concluded that the term "flood" was

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[1] *In re Katrina Canal Breaches*, 466 F.Supp. 729 (E.D. La. 2006).

susceptible of multiple meanings and did not plainly distinguish between naturally caused events and man-made events. The district court also noted that Travelers had written its earth movement exclusion in such a manner as to explicitly exclude earth movement arising from both man-made causes and naturally caused events. Concluding that Travelers could have written a narrower water damage exclusion in the same manner, the district court held that the term "flood" was ambiguous and limited only to naturally caused events. This appeal followed and the panel reversed.[2]

STATEMENT OF FACTS

Xavier is a New Orleans University that was founded in 1915, through the efforts of St. Katharine Drexel and the Sisters of the Blessed Sacrament, who established the school from which Xavier evolved. As the nation's only institution of higher learning that is historically Black and Catholic, Xavier's purpose from its founding has been to help create a more just and humane society.

On August 29, 2005, Xavier's campus sustained serious damage as a result of Hurricane Katrina's strong winds. The buildings were further damaged when the walls and levees containing two man-made drainage canals failed resulting in a spread of ground water that eventually inundated Xavier's campus.

Before Katrina, Xavier procured from Travelers an all risks property insurance policy ("the Policy"), which provided "all risks" coverage "for direct physical loss of or damage to Covered Property

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[2] The panel opinion is attached as Exhibit "A."

caused by or resulting from a Covered Cause of Loss. The Policy defined Covered Causes of Loss as:

> Risks of DIRECT PHYSICAL LOSS unless the loss is: Excluded in Section B., Exclusions; Limited in Section C., Limitations; or Excluded or limited in the Declarations or by endorsements.

To repair its property and prepare its campus to reopen in January 2006, Xavier made demand on Travelers to fulfill its obligations under the Policy. Travelers, however, failed to adjust the claim in a timely manner, and Xavier filed its Complaint with the district court on February 2, 2006, because Travelers had not made any payments to Xavier under the Policy. In its Answer, Travelers raised as an affirmative defense the following policy language that it contends excludes coverage for part of Xavier's losses:

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that has contributed concurrently or in sequence to the loss.
>
> . . .
>
> g. Water
>
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

ARGUMENT

The panel erred in overturning Judge Duval's well reasoned ruling, which ruling is consistent with the rulings of every single Louisiana State District Court

that has considered the same issue.[3] The panel either should have certified the issue to the Louisiana Supreme Court or affirmed. This ruling potentially impacts 80% of the residents and business owners in New Orleans. The extraordinary importance of this issue to the people of Louisiana is underscored by the fact that U.S. Senator Mary Landrieu released a statement calling for this Court to reconsider the decision of the panel.[4] Both grounds for en banc reconsideration are present here.

I. THE PANEL ERRED IN REFUSING TO CERTIFY THE ISSUE OF THE AMBIGUITY OF THE "FLOOD" EXCLUSION TO THE LOUISIANA SUPREME COURT

The decision by the panel involves rushing to make an Erie "guess" as to what Louisiana's appellate courts will do with an issue when there was no need to do so. Particularly, given the circumstances of the inundation of New Orleans, and the fact that it affected hundreds of thousands of persons, there is absolutely no doubt that the Louisiana Supreme Court will squarely address the issue of whether "flood" exclusions are ambiguous in the very near

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[3] *Historic Restoration Incorporated, et al. v. RSUI Indemnity Co. & Essex Ins. Co.*, No. 06-4990, Div. D-16, December 5, 2006, Judgment and Reasons for Judgment, attached hereto as Exhibit "B;" *Joseph Sher v. Lafayette Ins. Co.*, et al., No. 06-9276, Div. G-11, February 9, 2007, Judgment, attached hereto as Exhibit "C;" *White III, L.L.C. v. Travelers Property Casualty of America*, No. 06-09607, Div. G-11, July 26, 2007, Judgment, attached hereto as Exhibit "D;" *White v. Louisiana Citizens Prop. Ins. Corp.*, No. 06-7975, Div. K-5, July 26, 2007, Judgment attached hereto as Exhibit "E."

[4] Exhibit "F" August 3, 2007 statement of Senator Mary Landrieu.

future. As such, this is not an instance where guidance from the Supreme Court is unlikely or may not issue for years. Given that, "guessing" what Louisiana courts will rule is inappropriate, and for that reason, this Court should either certify the issue to the Louisiana Supreme Court or stay issuance of mandate until such ruling is issued.

The exact issue decided here is scheduled to be argued before a five-judge panel[5] of the Louisiana Fourth Circuit less than a month from now on September 12, 2007, in the case of *Joseph Sher v. Lafayette Ins. Co., et al.*, *Sher* was initially set before a three-judge panel, but after the panel opinion in this case was issued, it was changed to a five-judge panel.[6] The fact that the Fourth Circuit elected to have a five-judge panel hear the appeal means that the case will reach the Louisiana Supreme Court as quickly as possible as the Constitutional provision providing for rehearing by a five-judge panel if a three judge panel is split is satisfied by initially having a case heard to a five-judge panel.[7] The Fourth Circuit in *Sher* has fast-tracked the appeal process. In *Sher*, the district court found a flood exclusion substantially identical to the Xavier exclusion to be ambiguous.

This Court may certify certain questions to the Louisiana Supreme Court when "questions of propositions of law of this state which are determinative of said cause independently of any other questions

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[5] Attached as Exhibit "G" is the Order or hearing before a five-judge panel in the *Sher* case.

[6] Attached as Exhibit "H" is the Notice of Argument in the *Sher* case initially setting it for hearing before 3 Judges.

[7] *Perkins v. Entergy Corp*, 782 So.2d 606, 610-611 (La. 2001).

involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state." La. Sup. Ct. R. XII(1). Here, it is submitted that the panel erred in refusing to certify this question, especially given that the *Sher* case is being argued in less than a month.

A "federal court sitting in diversity is bound to follow decisions of state's intermediate courts unless it is 'convinced by other persuasive data that the highest court of the state would decide otherwise.'"[8] Similarly, in diversity cases, this Court must follow subsequent state court decisions that are clearly contrary to a prior decision of this Court.[9] Here, the fact that there will be a subsequent state court appellate decision is a given, the only unknown is whether it will agree the "flood" exclusion is ambiguous. If this Court does not either certify this issue or stay issuance of mandate in this case, there is the very real possibility that when the *Sher* decision is issued, Judge Duval will face the same motions again, which will no doubt result in another round of appeals. This will result in parties and the courts spending unnecessary time dealing with an issue that has already been decided by Louisiana district courts and will undoubtably be decided by Louisiana state appellate courts.

The panel's explanation for not certifying the question is that "the rules of contractual interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this

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[8] *Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc.*, 55 F.3d 181, 185, n. 17 (5th Cir. 1995), *quoting Pruitt v. Levi Strauss & Co.*, 932 F. 2d 458, 465-66 (5th Cir. 1991).

[9] *Id.*

appeal."[10] This rationale is belied by the fact that every single Louisiana jurist that has thus far considered the issue has reached a conclusion contrary to that reached by the panel. Rather than "guess" at what the Louisiana Supreme Court will do with the issue, this Court should certify the question, or at the very least stay issuance of the mandate until the *Sher* case is decided.

Notably, the same panel that heard this case certified an insurance issue to the Texas Supreme Court on August 8, 2007, stating that while it could make an "*Erie* guess," "we believe the appropriate rule is better determined by the Supreme Court of Texas."[11] Here, the interpretation of the "flood" exclusion is better determined by the Louisiana Supreme Court, especially given the number of Louisiana residents that may be impacted.

II. THE PANEL INCORRECTLY REFUSED TO DISTINGUISH BETWEEN MAN-MADE AND NATURAL CAUSES, IN DIRECT CONTRADICTION OF THIS COURT'S RULING IN PEACH STATE

The district court relied on this Court's prior decision in Peach State[12] that a so-called "earth movement" exclusion was ambiguous because it did not differentiate between natural earth movement and non-natural earth movement. There, the plaintiff's building was damaged following heavy rains that washed away uncompacted fill dirt under the

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[10] Panel opinion, p. 25, n.11.

[11] *OneBeacon Insurance Co. v. Don's Building Supply, Inc.*, No. 06-10727 (5th Cir. August 8, 2007, slip opinion at p. 7.

[12] *Peach State*, 507 F.2d 996 (5th Cir. 1975).

foundation of its building resulting in the building's collapse. The insurer denied coverage on the basis of a provision that excluded coverage for damage resulting from "'[e]arthquake, volcanic eruption, landslide or other earth movement.'" Plaintiff contended that the exclusion was inapplicable because it did not apply to earth movement caused by external sources. The district court entered judgment in favor of the insurer.

This Court reversed the judgment regarding the interpretation of the earth movement exclusion, noting:

> There is no clear manifestation here of an intent not to limit the general term other earth movement in this policy to events of the same nature as earthquakes, volcanoes, and landslides. . . . *[W]e read other earth movement as referring only to phenomena related to forces operating within the earth itself, and not to the merely superficial effects of external forces, such as erosion by run-off rainwater.*[13]

The panel decision here relegated the *Peach State* decision to a footnote finding its natural versus non-natural distinction "unworkable" and the work of "a small majority of jurisdictions."[14] The decision to disregard an earlier decision of another panel is disturbing. The general rule in this Circuit is that one panel cannot overrule another panel.[15] While here, the panel decision may not directly overrule

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[13] *Id.* at 999-1000 (emphasis added).

[14] Panel decision, p. 38 n.21.

[15] *League of United Latin American Citizens v. Clements*, 914 F.2d 620, 623 n.3 (5th Cir. 1990); *Broussard v. Southern Pacific Transportation*, 665 F.2d 1387, 1389 (5th Cir. 1982).

Peach State, as that case was decided under Georgia law, it certainly contradicts the *Peach State* holding to the extent that it rejects a distinction between natural and non-natural causes. There is no logical basis for finding an earth movement exclusion that fails to make such a distinction to be ambiguous, but not finding a "flood" exclusion that fails to make the same distinction to be ambiguous.

The Louisiana legislature distinguishes between man-made and natural disasters, categorizing "floods" as natural. La. R.S. 29:762 provides:

> (iii) A disaster, including but not limited to natural disasters such as hurricane, tornado, storm, flood, high winds, and other weather related events, forest and marsh fires, and man-made disasters, including but not limited to nuclear power plant incidents or nuclear attack, hazardous materials incidents, accidental release or chemical attack, oil spills, explosion, civil disturbances, public calamity, hostile military action, and other events related thereto.

(Emphasis added). Similarly, La. R.S. 29:723 states:

> (1) "Disaster" means the result of a natural or man-made event which causes loss of life, injury, and property damage, including but not limited to natural disasters such as hurricane, tornado, storm, flood, high winds, and other weather related events, forest and marsh fires, and man-made disasters, including but not limited to nuclear power plant incidents, hazardous materials incidents, oil spills, explosion, civil disturbances, public calamity, acts of terrorism, hostile military action, and other events related thereto.

Clearly, the Louisiana legislature considers "floods" to be natural, not man-made.

The distinction between man-made and natural inundation is a real one. The greatest example of "flood" dates back to Noah in the book of Genesis:

> (6) Now Noah was six hundred years old when the flood of water came upon the earth. (7) Then Noah and his sons and his wife and his sons' wives with him entered the ark because of the water of the flood. (10) It came about that after the seven days, that the water of the flood came upon the earth. (11) In the six hundredth year of Noah's life, in the second month, on the seventeenth day of the month, on the same day all the fountains of the great deep burst open, and the floodgates of the sky were opened. (12) The rain fell upon the earth for forty days and forth nights. . . . (17) The flood continued upon the earth for forty days.[16]

Further, the Louisiana Legislature has made it abundantly clear in Act No. 381 of the 2007 Regular Legislative Session that in order for a homeowners policy loss to be considered an "Act of God," the loss must occur without human intervention.[17] The Louisiana Legislature views Acts of God, such as a "flood," as incidents resulting exclusively without human intervention as opposed to man-made dis-

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[16] *Genesis* 7:6-7, 10-12, 17.

[17] See Exhibit "I". The relevant portion of Act No. 381 provides, ". . . As used in this Subsection, the phrase "two or more claims within a period of three years" shall not include any loss incurred or arising from an 'Act of God' incident which is due directly to forces of nature and exclusively without human intervention." (emphasis added).

asters, such as the New Orleans levee breaches. This is consistent with the district court's holding that the term "flood" is limited to naturally-occurring acts.

Similarly, dictionaries define "flood" in natural terms. Merriam-Webster's Online Dictionary defines "flood" as "(A) A rising and overflowing or a body of water especially onto normally dry land; (B)A flood described in the Bible as covering the earth in the time of Noah."[18] *Websters' Third New International Dictionary of the English Language*, defines "flood," in part, as a "rising and overflowing of a body of water that covers land not usu[ally] under water."[19] Finally, *Black's Law Dictionary* defines "flood" as:

> Inundation of water over land not usually covered by it. Water which inundates area of surface of earth where it ordinarily would not be expected to be. *See also* Act of God.[20]

Act of God" is defined as "[a]n act occasioned exclusively by forces of nature without the interference of human agency."[21] The district court, the Peach State court and the Louisiana courts that have found the distinction between natural and non-natural causes significant are correct.

This distinction is supported by the fact that a number of courts, in cases involving failure of man-made water mains, have held that water escaping from a broken water main is not a "flood" for the

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[18] http://www.merriam-webster.com/dictionary/flood (emphasis added).

[19] *Webster's Third New Int'l Dictionary* 873 (1993).

[20] *Black's Law Dictionary* at 640 (6th Ed. 1990)(emphasis added).

[21] *Id.* (Emphasis added).

purposes of a "flood" damage exclusion.[22] These cases and this matter share a similar factual basis. In both, the insured sustained water inundation when man-made structures meant to contain the flow of water—water mains and the levees/walls along the 17th Street and London Avenue drainage canals—failed.

III. THE PANEL ERRED IN IGNORING THE DOERR DECISION, WHICH IS INSTRUCTIVE IN EXPLAINING LOUISIANA LAW CONCERNING WHEN AN INSURANCE POLICY IS AMBIGUOUS

In *Doerr v. Mobil Oil Corp*,[23] the Louisiana Supreme Court discussed in great detail what makes an exclusion in an insurance policy ambiguous, yet the panel chose to disregard *Doerr*. Under *Doerr*, the policy exclusion at issue here is clearly ambiguous, and Judge Duval's ruling to that effect should have been affirmed. Particularly, the *Doerr*, Court held:

> The Civil Code is clear that if a contract does not lead to absurd consequences it will be enforced as written. *See* La. Civ. Code art. 2046. When absurd results are possible from such a reading, however, the contract is ambiguous, and the courts must construe the provision in a manner consistent with the "nature of the contract,

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[22] *Change, Inc. v. Westfield Insurance Co.*,542 S.E.2d 475 (W. Va. 2000); *Ebbing v. State Farm Fire & Casualty Co.*,1 S.W.3d 459 (Ark. Ct. App. 1999); *Popkin v. Security Mutual Insurance Co. of New York*, 367 N.Y.S.2d 492 (N.Y. App. Div. 1975). Interestingly, in at least one case an insurer took a position consistent with these cases by claiming a broken water main was not a "flood." *Mateer v. Reliance Ins. Co.*, 233 A.2d 797 (Ma. Ct. App. 1967).

[23] 774 So. 2d 119 (La. 2000).

> equity, usages, the conduct of the parties before and after the formation of the contract and other contracts of a like nature between the same parties."[24]

Here, the exclusion at issue, as read by the panel, results in absurd consequences. Particularly, here, the panel would have any inundation of land by water be an excluded flood, even those caused by the actions of man. What if here, instead of man-made canals failing, a man-made municipal water tower full of water failed due to a design defect, inundating a neighborhood? By the panel's reasoning, that event would be an excluded "flood." What if here, a Corps of Engineers employee crashed a vehicle into the same water tower resulting in the same wide scale inundation? According to the panel, that too is an excluded "flood." What if the same Corps employee crashed the vehicle into the large drainage pipes that run along side Interstate 10 near the Orleans/ Jefferson parish line?25 If the Corps intentionally dynamites a levee, as was done in 1927, is that an excluded "flood"? There is no logical basis for the position that the "flood" exclusion excludes from coverage the acts of man that result in properties being inundated.

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[24] *Id.* at 124.

[25] Those pipes in fact discharge into the 17th Street canal - is this water a "flood" if the canal wall fails but not a flood if the drainage pipes are breached?

IV. THE PANEL BASED ITS OPINION ON THE INCORRECT FACTUAL ASSUMPTION THAT THE DRAINAGE CANALS AT ISSUE "OVERFLOWED THEIR NORMAL BOUNDARIES"

The panel opinion is based upon a completely unfounded factual assumption that the canals at issue "overflowed their normal channels" and "overflowed their normal boundaries."[26] Neither Travelers nor any other party presented any evidence that the canals overflowed their boundaries in opposition to the Motion for Summary Judgment. The canals at issue are man-made drainage canals and their sides are concrete I walls. Thus, the "normal boundaries" of the 17th Street Canal and the London Avenue Canal, which are both man-made drainage canals, are concrete walls. Those concrete walls broke because of the faulty work of the U.S. Army Corps of Engineers. The water in those canals did not "overflow" anything, it broke through the faulty walls. Accordingly, the entire analysis of the panel is based upon a faulty assumption that the canals "overflowed" their normal boundaries.

The error regarding whether the canals overflowed is critical to the panel's opinion. The panel engages upon a lengthy analysis of the difference between "overflowed" and "overtopped," discounting the well reasoned opinion of the district court on the basis that it finds the canals did not "overtop," instead concluding that the relevant analysis is whether they "overflowed." This analysis is flawed from the inception as the drainage canals at issue neither overflowed nor were overtopped—their walls failed

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[26] Panel opinion at pp. 35, 47.

before water reached the top of them due to the fault of the U.S. Army Corps of Engineers.

That distinction is critical because the exclusion only speaks in terms of natural events, not man-made events. The excluded events are "flood, surface water, waves, tides, tidal waves, overflow of any body of water. . ." Here, none of these terms describes what in fact happened. There was no "overflow" of a body of water. The man-made walls of man-made drainage canals broke due to the fault of man.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant en banc reconsideration, should vacate the panel opinion, and should either affirm the district court's November 27, 2006 Order and Reasons in favor of Xavier or certify the issue to the Louisiana Supreme Court.

RESPECTFULLY SUBMITTED:

/s/ James M. Garner

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TIMOTHY B. FRANCIS #14973
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APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30119

XAVIER UNIVERSITY OF LOUISIANA,
Plaintiff-Appellee,
VERSUS
TRAVELERS CASUALTY PROPERTY COMPANY
OF AMERICA,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Louisiana
No. 05-4182
Hon. Stanwood R. Duval, Jr.

In Re: Katrina Canal Breaches Consolidation
Litigation Pertains To: Insurance
Xavier University, No. 06-516

MOTION FOR STAY OF MANDATE

JAMES M. GARNER, #19589
DARNELL BLUDWORTH, #18801
TIMOTHY B. FRANCIS #14973
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Attorneys for Plaintiff-Appellee
Xavier University of Louisiana

CERTIFICATE OF INTERESTED PERSONS

(1) In Re: Katrina Canal reaches consolidated Litigation No. 05-4182. Pertains to: Insurance (Xavier, No. 06-516)

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs:

1. Gladys Chchardy
2. Daniel Fontanez
3. Jacqueline Fontanez
4. Larry Forster
5. Glendy Forster
6. Kenneth Maier
7. Judith Maier
8. Randy Gervais
9. Lori Gervais
10. Andre Mauberret
11. Marlin Mauberret
12. Debbie Strawn
13. Dave Strawn
14. Stephanie Boyd
15. Brad Boyd
16. New Orleans Flooring Supply, Inc.
17. Shawn Burst
18. Angelina Burst
19 Susan Brown (misidentified as Patricia Brown in Amended Complaint)
20. Marie Fatheree
21. Katrina Daniels
22. Lionel Jones

23. Edna Jones
24. Karen Lewis
25. Shane Sylvester
26. Austra Zapata
27. Sabrina Perkins
28. Eldridge Pollard
29. Michael Peterson
30. Wendell Glation
31. Mack Barham
32. Richard Vanderbrook
33. Mary Jane Silva
34. Madeline Grenier
35. James Capella
36. Jack Capella, Executor of the Succession of Lilian Cappella
37. Gregory Jackson
38. Peter Ascani, III
39. Robert G. Harvey, Sr.
40. Xavier University of Louisiana
41. Kelly A. Humphreys

Counsel for Plaintiffs:

42. Joseph J. McKernan
43. Gordon J. McKernan
44. McKernan Law Firm
45. Chet Boudreaux
46. Joseph Bruno
47. David S. Scalia
48. Bruno & Bruno
49. Thomas Corrington
50. Larry Dewayne Dyess
51. James Parkerson Roy
52. Domengeaux, Wright, Roy& Edwards
53. Calvin C. Fayard, Jr.
54. Wanda Jean Edwards
55. Fayard & Honeycutt

56. David Blayne Honeycutt
57. John N. Ellison
58. Darin McMullen
59. Anderson Kill & Olick, PC
60. Drew Ranier
61. Norval Frank Elliott, III
62. Ranier Gayle & Elliott, LLC
63. Robert G. Harvey, Sr.
64. Tamara Kluger Jacobson
65. Matthew D. Schultz
66. Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor
67. James M. Garner
68. Timothy B. Francis
69. Darnell Bludworth
70. Kevin M. McGlone
71. Sher Garner Cahill Richter Klein & Hilbert, LLC
72. Vernon Palmer Thomas
73. Gia Kim
74. Rex Heinke
75. Akin Gump Strauss Haur & Feld, LLP

Defendants and Counsel:

76. Great Northern Insurance Company
77. Steven W. Usdin
78. H. Christopher Bartolomucci
79. Christopher T. Handman
80. Hogan & Hartson, LLP
81. Edward R. Wicker, Jr.
82. Barrasso Usdin Kupperman Freeman & Sarver, L.L.C.
83. State Farm Fire & Casualty Company
84. Wayne J. Lee
85. Stephen G. Bullock
86. Sarah House Barcellona

87. Lesli D. Harris
88. Stone, Pigman, Walther, Wittmann, LLC
89. Allstate Insurance Company
90. Allstate Indemnity Company
91. Judy Y. Barrasso
92. Sonnenschein Nath & Rosenthal LLP
93. Richard L. Fenton
94. Sonnenschein, Nath & Rosenthal
95. Natalie J. Spears
96. Kendra Kekelis Hartman
97. Lafayette Insurance Company
98. Howard Bruce Kaplan
99. Bernard, Cassisa, Elliot & Davis
100. William J. Wegmann, Jr.
101. Orr Adams, Jr.
102. Harry M. Reasoner
103. Marie R. Yeates
104. Gwendolyn R. Samora
105. Vinson & Elkins, LLP
106. Liberty Mutual Fire Insurance Company
107. H. Minor Pipes, III
108. The American Insurance Company
109. Kelly Cambre Bogart
110. C. Michael Pfister
111. Jaime Michele Cambre
112. Kevin R. Derham
113. Lawrence J. Duplass
114. Duplass, Zwain, Bourgeois, Morton, Pfister & Weinstock
115. Auto Club Family Insurance Company
116. Alan J. Yacoubian
117. Johnson, Johnson, Barrios & Yacoubian
118. Neal J. Favret
119. Louisiana Citizens Property Insurance Company
120. John William Waters, Jr.

121. Gregory J. McDonald
122. Bienvenu, Foster, Ryan & O'Bannon
123. Travelers' Property Casualty Company of America
124. The Standard Fire Insurance Company
125. Stephen E. Goldman
126. Wystan M. Ackerman
127. Robinson & Cole, L.L.P.
128. Ralph Shelton Hubbard, III
129. Seth Andrew Schmeekle
130. Joseph Pierre Guichet
131. Tina L. Garmon
132. Simeon B. Reimonenq, Jr.
133. Lugenbuhl, Wheaton, Peck, Rankin & Hubbard
134. Hartford Insurance Company of the Midwest
135. Christopher W. Martin
136. Martin R. Sadler
137. Martin, Disiere, Jefferson & Wisdom, L.L.P.
138. Lexington Insurance Company
139. John E. Baay, III
140. Robert I. Siegel
141. Daniel Gibbons Rauh
142. Geiger, LaBorde & Laperouse, L.L.C.
143. Richard Doren
144. Anthony Edelstein
145. Daniel E. Nelson
146. Gibson, Dunn & Crutcher
147. Encompass Indemnity Company
148. Susan M. Rogge
149. AEGIS Security Insurance Company
150. Maura Zivalich Pelleteri
151. Amy M. Seltzer
152. Krebs, Farley & Pelleteri, L.L.C.

153. Hanover Insurance Company
154. Paul E.B. Glad
155. Kevin P. Kamraczewski
156. David R. Simonton
157. Andrew R. Greene
158. Kristopher T. Wilson
159. LaDonna Grey Wilson
160. Dominic F. Perella
161. Unitrin Preferred Insurance Company
162. Neil C. Abramson
163. Nora B. Bilbro
164. Phelps, Dunbar, LLP
165. AAA Homeowners Auto Club Family Insurance Co.

Amicus Curaie Appearances & Counsel:

166. Laura Anne Foggan
167. Charles C. Foti, Jr.
168. Alan S. Gilbert
169. Nancy B. Gilbert
170. Levon G. Hovnatanian
171. Christopher Keith Jones
172. Steven C. Judice
173. Jay M. Lonero
174. Christopher Weldon Martin
175. Anne W. Mitchell
176. Sean Patrick Mount
177. Dominic J. Ovella
178. Christopher Raymond Pennison
179. Daniel Michael Redmann
180. Marshall M. Redmon
181. Amy R. Sabrin
182. Tiffany N. Thornton
183. John Powers Wolff, III
184. American Insurance Association
185. Mutual Insurance Co.

186. Centre Insurance Co.
187. Charles C. Foti, Jr., Attorney General for the State of Louisiana
188. Empire Fire & Marine Insurance Co.
189. Empire Indemnity Insurance Co.
190. Farmers Insurance Exchange
191. Fidelity & Deposit Company of Maryland
192. Freedomworks
193. Hailey, McNamara, Hall, Larmann & Papale
194. Horace Mann Insurance Company
195. Keogh, Cox & Wilson, Ltd.
196. Larzelere Picou Wells Simpson & Lonero
197. National Association of Mutual Insurance Co.
198. Property Casualty Insurers Association of America
199. Reinsurance Association of America
200. Republic Fire & Casualty Insurance Co.
201. Skadden, Arps, Slate, Meagher & Flom
202. United Services Automobile Association
203. Wiley, Rein, LLP

District Court Judge Rendering Decision Below:

204. Honorable Stanwood R. Duval, Jr., U.S. District Court for the Eastern District of Louisiana

/s/ James M. Garner

JAMES M. GARNER, #19589
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TIMOTHY B. FRANCIS #14973
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Xavier University of Louisiana

MAY IT PLEASE THE COURT:

Plaintiff-Appellee Xavier University of Louisiana ("Xavier") respectfully submits this Motion for Stay of Mandate.

In its August 2, 2007, Opinion, this Court concluded that the "water damage" exclusion in the policy issued by Travelers Casualty Property Company of America ("Travelers") to Xavier "unambiguously precludes . . . recovery" for damages that result from the "rupture" of levees along three major canals.[1] In so ruling, this Court not only vacated the contrary ruling from Judge Stanwood Duval, directly contradicted the rulings of every single Louisiana State District Court that has considered the same issue.[2]

The appeal of one of these decisions is scheduled to be argued to the Louisiana Fourth Circuit Court of Appeal on September 12, 2007, before a five Judge panel.[3] *Sher* was initially set before a three-judge panel, but after the panel opinion in this case was issued, it was changed to a five-judge panel.[4] The

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[1] *See* August 2, 2007, Opinion, p. 3 (hereinafter, "Opinion").

[2] *Historic Restoration Incorporated, et al. v. RSUI Indemnity Co. & Essex Ins. Co.*, No. 06-4990, Div. D-16, December 5, 2006, Judgment and Reasons for Judgment, attached hereto as Exhibit "A;" *Joseph Sher v. Lafayette Ins. Co.*, et al., No. 06-9276, Div. G-11, February 9, 2007, Judgment, attached hereto as Exhibit "B;" *White III, L.L.C. v. Travelers Property Casualty of America*, No. 06-09607, Div. G-11, July 26, 2007, Judgment attached hereto as Exhibit "C;" *White v. Louisiana Citizens Prop. Ins. Corp.*, No. 06-7975, Div. K-5, July 26, 2007, Judgment attached hereto as Exhibit "D."

[3] Attached as Exhibit "E" is the Order or hearing before a five-judge panel in the *Sher* case.

[4] Attached as Exhibit "F" is the Notice of Argument in the *Sher* case initially setting it for hearing before three Judges.

fact that the Fourth Circuit elected to have a five-judge panel hear the appeal means that the case will reach the Louisiana Supreme Court as quickly as possible as the Constitutional provision providing for rehearing by a five-judge panel if a three-judge panel is split is satisfied by initially having a case heard to a five-judge panel.[5] The Fourth Circuit in *Sher* has fast tracked the appeal process.

Given that all of the Louisiana Judges that have decided this issue have reached a result contrary to that reached by the panel, there is a strong likelihood that, on an issue affecting hundreds of thousands of citizens, federal and state courts will reach different conclusions on the proper interpretation of the "flood" exclusion. If so, it would be manifestly unjust if the claim asserted by Xavier, a non-profit university with millions of dollars at stake, was governed by this Court's *Erie* guess instead of a definitive ruling from the Louisiana Supreme Court. Accordingly, pursuant to Federal Rule of Appellate Procedure 41(d), Xavier requests that this Court stay the mandate.

I. Rules for Mandates

The Federal Rules of Appellate Procedure require the circuit courts, following issuance of their opinions, to issue mandates to district courts.[6] Unless the court directs otherwise, a mandate "consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs."[7] A mandate is stayed by the timely filing of a petition for panel rehearing, petition for rehearing en banc, or

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[5] *Perkins v. Entergy Corp*, 782 So. 2d 606, 610-611 (La. 2001).

[6] *See* Fed. R. App. P. 41(a)

[7] *See id.*

motion for stay of mandate.[8] Xavier has filed a petition for rehearing en banc. Out of an abundance of caution, and in the event the petition for rehearing is denied before the state appellate courts have had their say, Xavier is also filing the present Motion for Stay.

Federal Rule of Appellate Procedure 41(b) states that a "mandate must issue" seven days after the time to file a petition for rehearing or seven days after an order denying such a petition or motion to stay. This rule provides, however, that a court "may shorten or extend the time."[9] Under this rule, a decision on whether to stay the issuance of the mandate "is entrusted to the circuit court's sound discretion."[10]

Federal Rule of Appellate Procedure 41(d)(2) states that a party may move to "stay the mandate pending the filing of a petition for writ of certiorari." This motion must "show the certiorari petition would present a substantial question and that there is good cause for a stay."[11] While this provision is not currently applicable because Xavier has not yet filed a petition for a writ of certiorari, there is nevertheless "good cause" to stay the issuance of a mandate.[12] Particularly, it is submitted that as the court maintains control over its mandate, it may stay

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[8] *See* Fed. R. App. P. 41(d)(1).

[9] *See* Fed. R. App. P. 41(b).

[10] *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989); *see also First Gibraltar Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995).

[11] *See* Fed. R. App. P. 41(d)(2)(A).

[12] Xavier reserves its right to file a renewed motion to stay issuance of mandate should the petitions for rehearing be denied and should it elect to petition for certiorari.

issuance of the mandate under circumstances not specifically addressed in Rule 41.[13]

II. There Are Valid and Compelling Grounds to Stay the Mandate.

This appeal centers on the proper interpretation, under Louisiana law, of the "water damage" exclusion in the policy issued by Travelers to Xavier. Judge Duval held that this exclusion was ambiguous. Judge Lloyd Medley, Judge Robin Giarrusso and Judge Herbert Cade, sitting in Civil District Court in Orleans Parish, likewise concluded that the water damage exclusion in the standard property policy was ambiguous.[14] In *Sher v. Lafayette Insurance Co.,* the insurer has appealed Judge Giarrusso's ruling on the water damage exclusion. This appeal is scheduled for oral argument on September 12, 2007, less than one month away. As discussed above, the Fourth Circuit has taken the unusual step of setting the case before a five-judge panel, which will expedite it reaching the Louisiana Supreme Court.

This Court acknowledged that, because the Louisiana Supreme Court has not examined the "flood" exclusion in the Katrina context, it had to make an *Erie* guess to determine "how [the Louisiana Supreme Court] would resolve" this issue.[15] The Louisiana appellate courts are, however, poised to end all guessing. In *Sher*, for example, the Fourth Circuit, by vacating an earlier order that extended the time to prepare briefs and by setting the case for hearing before a five-judge panel on September 12,

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[13] *First Gibraltar*, 42 F.3d at 897-898.

[14] *See* Exhibits "A," "B," "C," and "D."

[15] *See* Opinion, p. 21.

2007, has clearly expressed an intent to issue an opinion with all deliberate speed.[16]

Due to the magnitude of this issue, and the absence of controlling state jurisprudence, it is a near certainty that the Louisiana Supreme Court will address the "water damage" exclusion, possibly by the end of the year. Because the Louisiana Supreme Court will issue a definitive ruling on Louisiana law, Xavier requests that, on an issue of great importance to Xavier and countless others, this Court exercise its "sound discretion" to stay the issuance of the mandate until *Sher* is decided.

Courts determining whether to stay a mandate pending a writ of certiorari consider, in part, whether the writ is likely to be granted. This, in turn, requires courts to assess whether there is a split in the circuits.[17] Here, there is a potential split, not between circuits, but between state and federal courts on a central issue in the sprawling Katrina litigation. At least three state court judges already have held that the "water damage" exclusion is ambiguous. These holdings conflict with this Court's Opinion, thus underscoring the possibility that state and federal courts will offer different interpretations of the relevant policy language.

Moreover, an "abrupt change in the law shortly after the panel's opinion" supports a stay of the mandate.[18] In *Bryant*, the Ninth Circuit had issued an opinion that no diversity existed because of the presence of "John Doe" defendants. The United

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[16] *See* June 29, 2007 Order, attached hereto as Exhibit "G."

[17] *See United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993).

[18] *Bryan v. Ford Motor Co.*, 886 F.2d 1526, 1530 (9th Cir. 1989) (emphasis added).

States Supreme Court granted writs, but then vacated its order and denied the writs when Congress passed a statute explicitly stating that "doe" defendants do not defeat diversity. In response to a motion to extend the stay of mandate, the Ninth Circuit found that "Congress's action while this case was pending on certiorari justifies a stay of the mandate, and we choose to exercise our discretion to do so."[19]

Here, this Court made an *Erie* guess that, under Louisiana law, the "water damage" exclusion in the Travelers policy is unambiguous. While Xavier's petition for rehearing and, if necessary, writ of certiorari are pending, though, Louisiana appellate courts may issue rulings that eliminate the lack of Louisiana law on point, thereby obviating the need for an *Erie* "guess." Given the importance of this issue, which arises out of events that forever changed a city and a country, Xavier requests that this Court choose to exercise its discretion and stay its issuance of the mandate. Accordingly, based on the foregoing, Xavier requests that, pursuant to Federal Rule of Appellate Procedure 41, this Court stay the mandate until the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court issue rulings in *Sher*.

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[19] *Id.* (emphasis added).

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ATTORNEYS FOR PLAINTIFF-
APPELLEE XAVIER UNIVERSITY OF
LOUISIANA

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed AUG 27, 2007]

No. 07-30119

IN RE: KATRINA CANAL
BREACHES LITIGATION

RICHARD VANDERBROOK; MARY JANE SILVA; JAMES CAPELLA; MADELINE GRENIER, misidentified as Sophia Grapier; JACK CAPELLA, as the Executor of the Succession of Lilian Capella; GREGORY JACKSON; PETER ASCANI, III; ROBERT G HARVEY, SR.
Plaintiffs - Appellees - Cross-Appellants,

v.

UNITRIN PREFERRED INSURANCE COMPANY;
HANOVER INSURANCE COMPANY;
STANDARD FIRE INSURANCE COMPANY,
Defendants - Appellants,

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant - Cross-Appellee.

KELLY A HUMPHREYS,
Plaintiff - Appellee - Cross-Appellant,

v.

ENCOMPASS INDEMNITY COMPANY,
Defendant - Appellant - Cross-Appellee.

XAVIER UNIVERSITY OF LOUISIANA,
Plaintiff - Appellee,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,
Defendant - Appellant.

GLADYS CHEHARDY; DANIEL FONTANEZ; JACQUELYN FONTANEZ; LARRY FORSTER; GLENDY FORSTER; *et al.*,
Plaintiffs - Appellees - Cross-Appellants,

v.

ALLSTATE INDEMNITY COMPANY; ALLSTATE INSURANCE COMPANY; AMERICAN INSURANCE COMPANY; AEGIS SECURITY INSURANCE COMPANY; LAFAYETTE INSURANCE COMPANY; LIBERTY MUTUAL FIRE INSURANCE COMPANY; AAA HOMEOWNERS AUTO CLUB FAMILY INSURANCE COMPANY; LOUISIANA CITIZENS PROPERTY INSURANCE CORPORATION; LEXINGTON INSURANCE COMPANY; ENCOMPASS INSURANCE COMPANY OF AMERICA; GREAT NORTHERN INSURANCE COMPANY; HANOVER INSURANCE COMPANY; STANDARD FIRE INSURANCE COMPANY,
Defendants – Appellants,

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant - Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana, New Orleans

ORDER:

IT IS ORDERED that the motions of Appellee Xavier University of Louisiana and Appellees'

Daniel Fontanez, Jacquelyn Fontanez, Larry Forster, Glendy Forster, Gladys Chrdy, Et Al for a stay of the mandate pending Louisiana Fourth Circuit Court of Appeal's and Louisiana Supreme Court's rulings in Sher v. Lafayette Insurance Company is denied.

/s/ Carolyn Dineen King
CAROLYN DINEEN KING
UNITED STATES CIRCUIT JUDGE

MOT-21

APPENDIX I

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO.06-4990 DIVISION "D" SECTION 16

HISTORIC RESTORATION INCORPORATED., as insured and on behalf of additional Plaintiffs 302 Jefferson Street L.L.C., 800 Canal Street Limited Partnership, 800 Iberville Street Limited Partnership, Eleventh Floor Lodging, LLC, ELF Hotel Operating Company, LLC, Hammond Eastside Limited Partnership, Historic Restoration, Incorporated, Rental I, LLC, New Iberia High School Limited Partnership, Redemptorist Limited Partnership; South Peters Hotel Investors Limited Partnership, Terrebonne Elderly Housing Limited Partnership, The Bakery Condominium Association, Inc., Shreveport Renewal Limited Partnership, Nissen Building, LLC, Cupples Residential I, LLC and Union Limited Partnership

VERSUS

RSUI INDEMNITY COMPANY AND
ESSEX INSURANCE COMPANY

JUDGMENT

This matter was scheduled for hearing on Tuesday, October 13, 2006 on a Motion for Partial Summary Judgment filed on behalf of the Plaintiffs, Historic Restoration, Inc., et al. After considering law, evidence and the briefs of all parties;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Partial Motion for Summary Judgment is hereby Granted.

READ, RENDERED AND SIGNED in New Orleans, Louisiana this 5th day of December 2006.

/s/ Lloyd J. Medley
JUDGE LLOYD J. MEDLEY

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 06,4990Div./Sec. 16/D

HISTORIC RESTORATION INCORPORATED., as insured and on behalf of additional Plaintiffs 302 Jefferson Street L.L.C., 800 Canal Street Limited Partnership, 800 Iberville Street Limited Partnership, Eleventh Floor Lodging, LLC, ELF Hotel Operating Company, LLC, Hammond Eastside Limited Partnership, Historic Restoration, Incorporated, Rental I, LLC, New Iberia High School Limited Partnership, Redemptorist Limited Partnership; South Peters Hotel Investors Limited Partnership, Terrebonne Elderly Housing Limited Partnership, The Bakery Condominium Association, Inc., Shreveport Renewal Limited Partnership, Nissen Building, LLC, Cupples Residential I, LLC and Union Limited Partnership

VERSUS

RSUI INDEMNITY COMPANY AND
ESSEX INSURANCE COMPANY

FILED: _____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

Plaintiffs, Historic Restoration, Incorporated, 302 Jefferson Street LLC, 800 Canal Street Limited Partnership, 800 Iberville Street Limited Partnership, Eleventh Floor Lodging, LLC, ELF Hotel Operating Company, LLC, Hammond Eastside Limited Partnership, Historic Restoration, Incorporated,, LGD Rental I, LLC, New Iberia High School Limited Partnership, Redemptorist Limited Partner-

ship, South Peters Hotel Investors Limited Partnership, Terrebonne Elderly Housing Limited Partnership, The Bakery Condominium Association, inc., Shreveport Renewal Limited Partnership, Nissen Building, LLC, Cupples Residential 1, LLC, and Union Limited Partnership (collectively "HRI"), have moved the Court for Partial Summary Judgment and seek a holding that as a matter of law, that damage to the Chateau Sonesta Hotel, Gravier Place Apartments, Hilton Garden Inn French Quarter/CBD Hotel, and The Holmes Garage (collectively the "Properties") was caused by water which came through the 17th Street Canal and the London Avenue Canal breaches is covered under the "all risk" excess policies of insurance issued to HRI by defendants Essex Insurance Company ("Essex") and RSUI Indemnity Company ("RSUI) (collectively "Defendants"). Because this Motion is well founded, as detailed below, the Court has entered a Partial Summary Judgment in favor of HRI on this issue.

Essex issued HRI an "all risk" excess commercial insurance policy identified as policy number ESP3465 for the policy period May 31, 2005 to May 31, 2006 (the "Essex Policy"). The Essex Policy is excess over HRI's primary commercial insurance policy which was issued by The Hartford Insurance Group (the "Primary Policy").[1] The Essex Policy is an "all risk". insurance policy, including coverage of damages caused by the perils of Flood and Earthquake, as defined.

Defendant RSUI issued MU an excess "all risk" commercial insurance policy bearing policy number

---

[1] The Primary Policy is endorsed to provide coverage for "Flood."

NHD341277 for the policy period May 31,2005 to May 31, 2006 (the "RSUI Policy"). The RSUI Policy provides coverage in excess of the Essex policy and the Primary Policy and is an "all risk" insurance policy.

Of insured properties, the defendants allege Matte Chateau Sonesta Hotel, Gravier Place Apartments, Hilton Garden Inn Downtown/French Quarter Hotel, and The Holmes Garage (collectively the "Properties') sustained excluded "flood" damages. The affidavits on file establish that the water that entered these areas was not standing water that accumulated because of the rains of Hurricane Katrina, but was in fact as a result of the breach of the walls of the 17th Street Canal and/or the London Avenue Canal.

While the Essex Policy specifically includes coverage for the perils of Flood and Earthquake, the Policy contains a separate 100 Year Flood Zone Exclusion Endorsement, which excludes coverage for damage resulting from the peril of "Flood" for properties located in the 100 year Flood Zone, including Flood Zone A. HRI's Properties that sustained extensive water damage from the breach of the New Orleans levees are located within Flood Zone A; thus, Essex alleges in Paragraph 133 of its Answer that HRI's damages are subject to the Policy's purported "Flood" exclusion, and are alleged by Essex to not be covered by the Essex Policy.

The RSUI Policy excludes coverage for the perils of Flood and Earthquake, but does not include definitions of either the term "flood" or "earthquake." Regardless, RSUI also alleges in its second and third affirmative defenses that HRI's damages are excluded under the RSUI Policy as these damages allegedly resulted from the peril of "Flood."

The Court finds that the "flood" exclusions included in the Essex and RSUI Policies are not applicable because these exclusions apply only to naturally-occurring phenomena and not to an event caused by man-made acts. The inundation of HRI's properties resulted solely from the failures of the walls of the 17th Street Canal levees and/or the London Avenue Canal, which failures were of man-made objects and which failures occurred due to acts of man.

I. SUMMARY JUDGMENT STANDARD

> Louisiana Code of Civil Procedure article 966(A)(2) provides as follows:
>
> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. . . . The procedure is favored and shall be construed to accomplish these ends.[2]

A motion for summary judgment shall be granted upon a showing that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter law.3[3] The purpose of summary judgment is "to dispose expeditiously of cases involving issues of law and/or uncontested issues of fact."[4] It is "apropos when all the relevant facts are brought' before the Court, the relevant facts are

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[2] LA. CODE CIV. PROC. art. 966.

[3] *See King v. Phelps Dunbar, L.L.P.*, 98-1805, p. 3 (La. 6/4/99), 743 So.2d 181, 185.

[4] *Dettes v. Covington Motors, Inc.*, 426 So.2d 718, 719 (La. App. 1Cir. 1983).

undisputed, and the sole remaining issue relates to the legal conclusion to be drawn from those facts."[5]

In addition, Louisiana Code of Civil Procedure article 966(E) provides that "[s]ummary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case."[6]

The defendants have suggested that discovery is necessary before. HRI's Partial Summary Judgment Motion should be heard. However, it has been held as follows:

> Unless the opposing party can show a probable injustice, a suit should not be delayed pending discovery when the evidence shows at a early stage in the proceedings that there is no genuine issue of fact. There is no absolute right to discovery prior to a hearing on a motion for

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[5] Murphy's Lease & Welding Service, Inc. v. Bayou Concession Salvage, Inc., 2000-978, p. 5 (La. App. 3 Cir. 318/01), 780 So.2d 1284, 1288.

[6] *See also Griggs v. Riverland Medical Center*, 98-256 (La. App. 3 Cir. 10/14/98), 122 So.2d 15, 21 ("summary judgment may be granted on the issue of liability alone, It may not be granted on a particular element of liability when the judgment is not completely diapositive of the issue of liability between the parties and other issues such as comparative fault remain unresolved." However, "as long as the liability between the parties to the motion is resolved in the decision, partial summary judgment may be granted.") (internal citations omitted); *see also Crescent City Physicians v. Desse*, 03-2130 (La. App. 3/24/04), 871 So-2d 466 (affirming grant of summary judgment on liability alone); *Gravolet v Fair Grounds Corp.*, Nos. 03-0392, 03-0958, 2004 WL 1632911 (La. App. 4 Cir. July 14, 2004) (same).

> summary judgment and the only requirement is that the litigants be given a fair opportunity to be heard.

Smith v. Estrade, 589 So.2d 1158, 1162 (La. App. 5th Cir. 1991). Here, the issue at hand is interpretation of policy terms, an issue which is subject to consideration without extensive discovery and which is particularly appropriate for early consideration.[7] Furthermore, at the hearing on this motion, HRI agreed to provide discovery responses prior to the Court ruling on this motion, which the Court understands has occurred. As such, the written discovery responses are no longer outstanding, and do not pose an impediment to consideration of this motion. Furthermore, neither insurer has argued that depositions are needed before ruling on the motion. As such, discovery poses no impediment to the resolution of the pending Motion for Partial Summary Judgment.

II. POLICY INTERPRETATION AND BURDEN OF PROOF

In *Crabtree v. State Farm Insurance Co.*, 632 So. 26 736 (La. 1994), the Louisiana Supreme Court set forth the following general principles guiding interpretation of an insurance policy:

> An insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth

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[7] RSUI argues that the status of any National Flood Insurance Program ("NFIP") claims of FM is relevant to the present motion. However, extrinsic evidence is not relevant to determination of coverage under the Essex and RSUI policies. Further, the NFIP definition of "flood" is very different than the definitions of this term at issue here.

> in the Civil Code. If the words of the policy are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent and the agreement must be enforced as written. An insurance policy should not be interpreted in an unreasonable or strained manner so as to enlarge or restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. The policy should be construed as a whole and one portion thereof should not be construed separately at the expense of disregarding another. If after applying the other general rules of construction an ambiguity remains, the ambiguous contractual provision is to be construed against the insurer who issued the policy and in favor of the insured.[8]

In the construction of the policy, "the specific controls the general."[9] In other words, the meaning of general terms in the policy will be restricted by other specific or more descriptive terms on the same subject.[10]

The Essex and RSUI Policies are "all risk" policies. An "all risk" policy creates a special type of coverage extending to every conceivable loss or damage, unless clearly, specifically and expressly excluded therein.[11]

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[8] *Id.* at 74J (internal citations omitted).

[9] *Smith v. Burton*, 928 So. 2d 74, 79 (La. App. 1st Cir. 2005).

[10] *See Baton Rouge Oil and Chemical Workers Union v. Exxonmobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002); *Breaux v. Rimmer & Garrett, Inc.*, 320 So. 2d 214, 219 (La. App. 3d Cir. 1975).

[11] *See, e.g. Cochran v. Travelers Ins. Co.*, 606 So.2d 22, 24 (La.App. 5 Cir., 1992); *J. Roy McDermott & Co., Inc. v. Fidelity & Cas. Co. of New York*, 466 F.Supp. 353, 361 1979); *Dow Chem.*

Because HRI has established through uncontroverted evidence (and the insurers do not deny) that its properties sustained physical damages, the burden of proving an exclusion from coverage rests on the insurers.[12] The insurers attempt to shift this burden to HRI by questioning the sufficiency of the affidavits submitted. However, as those affidavits establish physical damage, it is the insurers' burden to show the damage was caused by an excluded cause of loss, not HRI's burden to show it was not. Particularly, the insurers must point the Court to the existence of a material fact demonstrating resulted from sources of water other than the breaches at the 17'th Street Canal and the London Avenue Canal, which canals are man-made structures.

III. THE POLICY LANGUAGE

While the Essex Policy specifically includes coverage for the perils of "Flood" and Earthquake, the Policy contains an exclusion that states as follows:

> 100 YEAR FLOOD ZONE EXCLUSION
>
> This policy does not insure against loss or damage caused by, directly or indirectly or resulting from the peril of Flood, if the location is located in the 100 year Flood Zone.

Co. v. Royal Indem Co., 635 F2d 379, 386 (5th Cir: 198I); *Trinity Indus., Inc v. Ins. Co. of N. Am.*, 916 F.2d 267, 269 n.11 (5th Cir. 1990).

[12] *See Doerr v, Mobil Oil Corp.*, 774 So. 2d 119, 124 (La, 2000) ("On the other hand, the insurer bears the burden of proving the applicability of an exclusionary clause within a policy."); *Dawson Farms, L.L.C v. Millers Mutual Fire Ins. Co.*, 794 So. 2d 949, 951 (La. App. 2d Cir. 2001) ("Under Louisiana law, it is the insurance company's burden to prove that a loss comes within a policy exclusion.").

> Flood Zone A, or the 100 year Flood plain consists of Zones A, Al through A30, AE, AH; AO, A99, V, VI through V30, VE or as designated by the Federal Emergency Management Association (FEMA) or the U.S. Corps of Engineers.
>
> The RSUI Policy also excludes coverage for the peril of "Flood," stating:
>
> 3. Perils Covered:All Risk Excluding Flood & Earthquake.

Because these policies are following form policies, the definition of the term "Flood" under the Primary Policy applies to both the Essex Policy and the RSUI Policy. The Essex Policy includes the following language regarding the application of the terms of the underlying Primary Policy:

> 2. Application of Underlying Provisions—Follow Form:
>
> The coverage and / or peril(s) insured in this policy are subject to the same terms, conditions, definitions, limitations, exclusions and warranties (except premium, rate, limit of liability, sublimit, deductible, definition of Ultimate Net Loss and any other obligation to investigate, adjust or defend claim or suit) as are contained in the policy(ies) of the Primary insurance.

Therefore, the definition of the term "Flood" under the Primary Policy applies to the Essex Policy, This conclusion is further supported by the fact that the Essex Policy is described as a "Follow Form" policy, indicating that its tetras and conditions follow the form of the Primary Policy.

The RSUI Policy states:

> In respect of the perils hereby insured against, this Policy is subject to the same warranties, terms and conditions (except as regards the premium, the amount and limits of liability other than the deductible or self-insurance provision where applicable, and the renewal agreement, if any; and EXCEPT AS OTHERWISE PROVIDED HEREIN) as are contained in or as may be added to the policy(ies) of the primary insurer(s) prior to the happening of a loss for which claim is made hereunder, and should any alteration be made in the premium for the policy(ies) of the primary insurer(s) then the premium hereon shall be adjusted accordingly.

The RSUI Policy does not include a definition of the term "Flood." Therefore, the definition of "Flood" under the Primary Policy also applies to the R&M Policy.[13]

The Primary Policy's definition of "Flood" is as follows:

> "Flood" means:
>
> 1. Surface water, wives, tidal water, tidal waves, tsunamis, or overflow of any natural or man made body of water from its boundaries, all whether driven by wind or not. This includes water that backs up from any storm or septic

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[13] RSUI has argued that Primary Policy excludes damage caused by the peril of "Flood" or the release of water held by a levee. However, the Primary Policy includes a "Flood Endorsement" that specifically provides coverage for the peril of "Flood" or the release of water held by a levee. Therefore, the Primary Policy's "Flood Endorsement" negates any contrary exclusionary language and said damages are covered.

sewer, that is caused by the above conditions and regardless of the proximity to such conditions.

2. Mudslide or mudflow, meaning a river or flow of liquid mud directly or indirectly caused by flooding or the accumulation of water under the ground.

VI. THE INSURERS HAVE PRODUCED NO EVIDENCE THAT THE "FLOOD" EXCLUSIONS ARE APPLICABLE

The term "Flood" as used in the Primary Policy and applicable to the Essex and RSUI Policies does not apply to the water that entered HRI's Properties following Hurricane Katrina. As set forth above, the insurers have the burden of proving that an exclusion is applicable, and have not done so here. Based on the record, the insurers have offered no evidence of the source of the water, and there is no evidence that the water came from a source other than the failures of the walls of the 17th Street Canal and the London Avenue Canal, both man-made structures, which failures resulted from the improper construction of the levees and floodwalls by the Corps of Engineers. Although HRI does not bear the burden of proving the inapplicability of an exclusion, it has submitted affidavits of Edward Boettner and Alfred L. Groos and the IPET report, supporting that any ground water that inundated the Properties did not come from storm surge, an overtopped levee, or rainwater that did not drain. properly.[14] The insurers have not

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[14] The defendants allege that the WET report is not proper summary judgment evidence. This allegation is not well founded, as the report is a government report that was peer reviewed and is inherently trustworthy. La. Code Evid. art. 803(4 In any event, as the insurers have the burden of proving

controverted this evidence other than by generally denying it, which is, insufficient to create. a material issue of fact.

The definition of "Flood" in the Primary Policy uses the terms "waves," "tidal water," "tidal waves," "tsunamis," or "overflow" of water. All of these words refer to natural events, Nothing in the language of the Essex, RSUI, or Primary Policies indicates that "Flood" applies to man-made events, As discussed above, exclusions from coverage are to be afforded a narrow construction, and, where there are No plausible interpretations of an exclusion, the court should find in favor of the interpretation that supports rather than withholds coverage.[15]

A plain reading of the definition of "Flood" in its entirety demonstrates that the term "Flood" applies only to naturally-occurring events because the events included in the definition of what constitutes a Flood —waves, tidal water, tidal waves, tsunamis, overflow of a body of water, or their spray—are solely naturally-occurring events.[16] In the construction of an

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the applicability of an exclusion, reliance on the WET report is not necessary to support granting of partial summary judgment here.

[15] *See Reynolds v. Select Properties, Ltd. v. Transcontinental Ins. Co.*, 634 So. 2d 1180, 1183 (La. 1994) ("Thus, a provision which seeks to narrow the insurer's obligation is strictly construed against the insurer, and, if the language of the exclusion is subject to two or more reasonable interpretations, the interpretation which favors coverage must be applied."); *Adams v. Arceneaux*„ 809 So. 2d 190,195 (La. App. 1st Cir. 2001); *Korossy v. Sunrise Homes*, Inc., 653 So. 2d 1215, 1227 (La. App. 5th Cir. 1995) (same).

[16] Although the definition does include reference to "overflow of any natural or man-made body of water from its boundaries" that wording is obviously not applicable as the canals at issue here did not "overflow"—their wails broke.

insurance policy, "the specific controls the general."[17] In other words, the meaning of general terms in the policy will be restricted by other specific or more descriptive terms on the same subject.[18] These principles are reflected in the contractual interpretation doctrines of *ejusdem generic*[19] and *noscitur a socciis*.[20]

This holding is supported by law from various jurisdictions.[21] Both *Peach* and *Murray* were cases where the courts considered earth movement exclusions and found them inapplicable to each movement caused by man-made, not natural, events. Following the *Murray* court's ruling, the Supreme Court of Appeals of West Virginia, in *Change, Inc. v. Westfield*

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[17] *Smith v. Burton*, 928 So. 2d 74, 79 (La. App, 1st Cir. 2005).

[18] *See Baton Rouge Oil and Chemical Workers Union v. Exxonmobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002).

[19] "In the construction of laws, wills, and other instruments, . . . where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be- held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black's Law Dictionary 517 (6th ed. 1990). In *Sommers v. Stare Farm Fire and Cas. Co.*, 765 So. 2d 87 (La. App, 4th Cir. 2000), the court applied the principle of *ejusdem generis* even though the specific term preceded the general term. *See id.* at 91.

[20] "It is known from its associates. The meaning of a word is or may be known from accompanying words. . . . [The meaning of questionable or doubtful words may be ascertained by reference to the meaning of other words or phrases associated with it." Black's Law Dictionary, *supra*, at 1060.

[21] *Peach State Uniform Service Inc. v. The American Insurance Co.*, 507 F.2d 996 (5th Cir. 1975); Murray v. State Farm Fire & Casualty Co., 509 S.E.2d 1 (W. Va. 1998).

Insurance Co.,[22] considered whether a flood exclusion strikingly similar to the "Flood" definition applicable to the Essex and RSUI policies applied only to events caused by man-made acts.

In *Change, Inc.*, the insured's property was damaged when a municipal water main broke. The insured made a claim on its commercial property carrier, which denied coverage on the basis ofthe flood exclusion because the water had come into the building from under its foundations. The trial court granted summary judgment in favor of the insurer, and the insured appealed. The Supreme Court of Appeals of West Virginia reversed the trial court's finding noting that the exclusion excepted damages caused by sprinkler leakages, a man-made cause, while excluding natural causes, such as damages caused by surface water, waves, and tides, Invoking the principles of *noscitur a sociis* and *ejusdem generis*, the court held that the general terms must be construed in light of the specific terms and, therefore, the insured's losses were covered for damages arising out of a man-made event.

The *Change, Inc.* court's reasoning is valid is supported by numerous other cases from other jurisdictions.[23] The exclusions here speak only in

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[22] 542 S.E.2d 475 (W. Va. 2000).

[23] *Ebbing v. State Farm Fire & Casualty Co.*, 1 S.W. 3d 459 (Ark. Ct. App. I 999)(water from burst water main not "flood" because from a man-made event, not natural causes); *Mellon v. Hingham Mutual Fire Insurance Co.*, 472 N.E.2d 674 (Mass. App. Ct. 1984) (water from broken .drainage pipe not excluded flood because "caused by an accidental break, rather than a natural occurrence"); *Popkin v. Security Mutual Insurance Co. of New York*; 367 N.Y.S.2d 492 (N.Y. App. Div. 1975) (water from a break in a water main not excluded flood); *Ender v. Nat'l Fire Ins. Co. of Hartford*, 563 N.Y.S.2d 85 (N.Y. App. Div. 1991)

terms of natural events, not the failure of manmade objects. As such, the insurers have not sustained their burden of proving that the waters that entered ERN properties were excluded "flood." The breaking of the man-made drainage canals is akin to the breaking of a water main or a drainage pipe, which, as shown by the *Change, Inc.* decision and other cases cited above has frequently been held to not be excluded "flood."

The Court believes that the exclusions here are clearly limited to natural events, not manmade events because the words in the definition of "flood" refer to natural events. However, at the very least the exclusions are ambiguous because they are subject to two interpretations—either all instances where water enters a structure are excluded or only natural events are excluded. A broadly-worded coverage exclusion susceptible of multiple interpretations is ambiguous as a matter of law and should be interpreted in a manner that supports rather than defeats coverage.

In *Doerr v. Mobil Oil Corp.*,[24] the Louisiana Supreme Court determined whether a "total pollution exclusion" in an "all risk" policy could defeat coverage for damages caused by the release of hydrocarbons into a parish-wide water system. The total pollution exclusion provided that no coverage was available for any damage "'which would not have occurred in whole or party but for the actual, alleged or threatened discharge, dispersal, seepage, migration,

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(break in water Main not excluded flood because the "water" exclusion applies to "damages resulting from natural causes, not from artificial devices").

[24] 774 So. 2d 119 (La. 2000).

release or escape of pollutants at any time."[25] Applying the above-referenced principles of policy interpretation, the Court concluded that the exclusion was so broadly worded that it could apply to "anything from the release of chloride gases by a conglomerate chemical plant to the release of carbon monoxide from a small business owner's delivery truck."[26] Continuing, the Court noted that even a slip and fall in a puddle of spilled gasoline at a gas station would not be covered by the total exclusion. Such a literal and broad construction of the wording would result in absurd consequences that would operate to defeat coverage, a result contrary to Louisiana insurance law. As a result, the Court held that the policy was ambiguous and. should be interpreted narrowly and in an effort to afford, not deny coverage.

Similarly, the *Murray*, court found that policy to be ambiguous because it was subject to multiple interpretations. Reviewing the terms of the exclusion, the court held:

> On the one hand, the exclusions cited in defendants' policies could bar coverage for solely *natural* events such as earthquakes, volcanic eruptions, and sinkholes. On the. other hand, the same exclusions refer to events which could be *man-made*, such as subsidence or earth movement caused by equipment or a broken water line. Or, as alleged in this case, earth movement could be caused by *both man made and nature* over a period of time, such as landslides, mudflows, or the earth shrinking, shifting, or

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[25] *Id.* at 122.

[26] *Id.* at 124.

> settling, *Because the policy language, is reasonably susceptible to different meanings, we believe that the earth movement exclusion in the insurance policies at issue are ambiguous, and moil have e more limited meaning than that assigned to it by the defendants.*

Murray, 509 S.E.2d at 9 (emphasis added).

The Court finds that the " Flood" exclusions in the Essex and RSUI Policies should also be read in the same reasonable manner. The Flood Exclusions, at best, are not clear regarding whether the term "Flood" refers only to naturally-occurring or man-made events, For example, the exclusions, if given the twointerpretation favored .by the insurers, would apply to water entering a property because of 1) breaking water mains, 2) vandals causing an above ground swimming pool to rupture, or 3) an airplane running into a water tower allowing its contents to escape. Such an interpretation would result in absurd consequences. M the Flood exclusions are susceptible of either interpretation, the exclusions are, therefore, ambiguous as a matter of law, and the more limited meaning, that "flood" does not include man-made causes, such as the failure of the wails of the outflow canals, is applicable. As the "Flood" exclusions are ambiguous at best, the well-established law of Louisiana requires this Court to construe the exclusions narrowly and in favor of coverage.

This finding is consistent with the November 27, 2006 Order of Judge Stanwood R. Duval, Jr. of the Eastern District of Louisiana in *In Re Katrina Canal Breaches Consolidated Litigation*, Civil Action No. 05-4182, holding that a flood exclusion similar to that of the Essex and RSUI Policies was ambiguous and thus, must be construed in favor of coverage under an

all-risk policy. The key question before Judge Duval, and before this Court as well, was whether it is reasonable to find that there are two interpretations of the term "flood"—one which results from both natural and man-made causes and another which results from solely natural causes. Applying Louisiana law on the rules of interpreting insurance contracts as well as the principles of ejusdem generis and *noscitur a sociis*., Judge Duval found that the term "flood" is susceptible to multiple reasonable interpretations and thus, ambiguous.

The insurers argue that even if the purported "Flood" exclusions are inapplicable, HRI's water-related damages are excluded under the "Acts, Errors and Omissions" exclusion of the Primary Policy. However the Primary Policy's "Acts, Errors and Omissions" exclusion includes "Ensuing Loss Coverage" which provides:

> Ensuing Loss Coverage: If physical loss or damage by a Covered Cause of Loss ensues, we will pay only for such ensuing loss ox damage.

Under the cited language, to the extent physical loss or damage by a Covered Cause of Loss ensues from the acts, errors, or omissions in the design of levees, then the Primary Policy, and in turn, the following-form Essex and RSUI Policies, provides coverage for the ensuing loss or damage. As the Court has already determined that the water damage sustained by HRI's Properties resulted from a Covered Cause of Loss, the Ensuing Loss Coverage of the Primary Policy renders the "Acts, Errors and Omissions" exclusion inapplicable.[27]

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[27] The Court notes that in his Order, Judge Dural addressed a special "Amendatory Endorsement" included Man unrelated

For these reasons, the Court enters Partial Summary Judgment in favor of HRI finding, that the "Flood" exclusions in the Essex and RSUI policies do not exclude coverage for any of HRI's damages.

New Orleans, Louisiana, this 5th day of December, 2006.

/s/ Lloyd Medley
JUDGE LLOYD MEDLEY

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insurance policy underwritten by the Hartford Fire Insurance Company, who is also the underwriter of HRI's Primary Policy. However, the Hartford Policy before Judge Duval did not include Ensuing Loss Coverage as Primary Policy and is therefore distinguishable.

APPENDIX J

HURRICANE LITIGATION

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA.

NO. 06-9276
DIVISION G-11

JOSEPH SEER,

versus

LAFAYETTE INSURANCE COMPANY, *et al.*,

FILED: _____
DEPUTY CLERK: _____

JUDGMENT

The above matter carne for a regularly-scheduled hearing on February 2, 2007 as to the following Motions:

1) Plaintiffs Motion for Partial Summary Judgment and

2) Lafayette Insurance Company's Motion to Strike Expert Witnesses or Continue Trial,

PRESENT:

James M. Garner, Esq.
For Plaintiff, Joseph Sher
Lauren L. Hudson, Esq.
Frank Dudenhefer, Jr., Esq.

Robert A. McMahon, Jr. Esq.
For Lafayette Insurance Company

Georgia Thomas, Esq
For Property Loss Consulting, Inc., Robert Jones and Wes Swank

The Court, after considering the memoranda, evidence and argument of counsel, ruled as follows:

IT IS ORDERED that Lafayette's Motion to Strike Expert Witnesses or Continue Trial is hereby DENIED;

IT IS FURTHERORDERED that Plaintiff's Motion for Partial Summary Judgment is hereby GRANTED because the "flood" exclusion is ambiguous; therefore, the policy covers manmade events and Lafayette has not met its burden of proving that any of the damage was not caused by a man made event.

JUDGMENT RENDERED this 2nd day of February, 2007 at New Orleans, Louisiana;

JUDGMENT READ AND SIGNED this 9th day of Feb., 2007 at New Orleans, Louisiana.

/s/ Robin Giarrusso
JUDGE ROBIN GIARRUSSO

APPENDIX K

HURRICANE LITIGATION

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA.

NO. 06-09607
DIVISION G-11

WHITE III, L.L.C. F/K/A JLH, L.L.C.,

versus

TRAVELERS PROPERTY CASUALTY OF AMERICA A/K/A ST. PAUL TRAVELERS AND STONE INSURANCE, INC.,

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FILED: _____
DEPUTY CLERK: _____

JUDGMENT

The above matter came for a regularly-scheduled hearing on July 20, 2007 as to the Plaintiff's Motion for Partial Summary Judgment.

PRESENT:

James M. Garner, Esq.
For Plaintiff, White III, L.L.C. f/k/a JLH, L.L.C.

Stephen Goldman, Esq.
For defendant, Travelers Property Casualty

Simeon Reimonenq, Esq
Company of America a/k/a St. Paul Travelers

The Court, after considering the memoranda, evidence and argument of counsel, ruled as follows:

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment is hereby GRANTED. because the "flood" exclusion is ambiguous; therefore, the policy covers man-made events and Travelers has not met its burden of proving that any of the damage was not caused by a man made event.

JUDGMENT READ AND SIGNED this 26th day of July, 2007 at New Orleans, Louisiana.

/s/ Robin Giarrusso
JUDGE ROBIN GIARRUSSO

APPENDIX L

ORLEANS FARM CIVIL DISTRICT COURT
STATE OF LOUISIANA

NUMBER. 2006-7975
SECTION 5
DIVISION "K"

STELLA WHITE,

VERSUS

LOUISIANA CITIZENS PROP. INS, CORP, *et al.*

JUDGMENT

This matter came for hearing on Juno 15, 2007, regarding Plaintiffs Motion for Partial Summary Judgment. The following attorneys were present:

David Carnella	For Plaintiff
Mickey Landry	For Plaintiff
MarquetteGreene-Young	For Defendant Louisiana Citizens Prop. Ins, Corp.

After consideration of the memoranda, pleadings, and evidence,

IT is, HEREBY ORDERED, ADJUDGED AND DECREED that Plain s Motion for Partial Sunmary Judgment is GRANTED-, The "Water Damage" exclusion contained in Louisiana Citizens' Homeowner's Policy #FZH-0074733-10 is ambiguous, and therefore, not applicable/unenforceable,

JUDGMENT RENDERED IN OPEN COURT this 15th day of June 2007, in New Orleans, Louisiana.

Judgment signed this 26th day of July, 2007.

New Orleans, Louisiana.

/s/ Herbert A. Cage
JUDGE, CIVIL DISTRICT
COURT, DIV. "K"

APPENDIX M

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

[Filed AUG 3, 2007]

No. 2007-CA-0757
(CDC# 20069275)
DIVISION "G-11"

JOSEPH SHER,

VERSUS

LAFAYETTE INSURANCE COMPANY; UNITED TIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; and PROPERTY LOSS CONSULTING, INC.

ORDER

IT IS HEREBY ORDERED that this matter is assigned for hearing by a five (5)-judge panel. The parties are ordered to file two (2) additional copies of all briefs with the court. The matter will be argued before the court on September 12, 2607 at 1 pm. The court imposes a deadline of August 17, 2007 for the filing of all pre-hearing motions.

New Orleans, Louisiana this 9th day of AUGUST, 2007.

/s/ Joan Bernard Armstrong
CHIEF JUDGE JOAN BERNARD ARMSTRONG

/s/Charles R. Jones
JUDGE CB: ARLES R. JONES

/s/ Patricia Rivet Murray
JUDGE PATRICIA RIVET MURRAY

/s/ Michael E. Kirby
JUDGE MICHAEL E. KIRBY

/s/ Terri F. Love
JUDGE TERRI F. LOVE

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Aug. 8, 2007]

No. 06-10727

ONEBEACON INSURANCE COMPANY, as Assignee of Potomac Insurance Company of Illinois,
Plaintiff – Appellee,

v.

DON'S BUILDING SUPPLY INC.,
Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas, Dallas

Before KING, DEMOSS, and OWEN, *Circuit Judges*.

PER CURIAM:

This diversity case involves important and determinative questions of Texas law as to which there is no controlling Texas Supreme Court precedent. Accordingly, we certify those unresolved questions to the Supreme Court of Texas.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF TEXAS, PURSUANT TO TEXAS CONSTITUTION ARTICLE 5, § 3-C AND RULE 58 OF THE TEXAS RULES OF APPELLATE

PROCEDURE TO THE SUPREME COURT OF TEXAS AND THE HONORABLE JUSTICES THEREOF:

I. STYLE OF THE CASE

The style of the case in which this certification is made is *OneBeacon Insurance Company v. Don's Building Supply, Inc.*, Case No. 06-10727 in the United States Court of Appeals for the Fifth Circuit, on appeal from the United States District Court for the Northern District of Texas, Dallas Division. Federal jurisdiction is based on diversity of citizenship.

II. STATEMENT OF THE CASE

Plaintiff-appellee OneBeacon Insurance Company ("OneBeacon") seeks a declaration that it has no duty to defend or indemnify its insured, defendant-appellant Don's Building Supply, Inc. ("DBS"), in twenty-two lawsuits[1] that various homeowners (the "homeowners") have filed against DBS and other defendants. DBS sought a defense from OneBeacon under three occurrence-based commercial general liability insurance policies ("CGL policies") issued to DBS by Potomac Insurance Company of Illinois ("Potomac") and assigned by Potomac to OneBeacon. After initially providing a defense to DBS, OneBeacon has since withdrawn the defense, denied any further obligation to DBS under the policies, and filed this declaratory judgment action. DBS asserted a counterclaim in response, and each party filed a motion for summary judgment. The district court granted summary judgment to OneBeacon, and DBS now appeals.

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[1] OneBeacon initially sought such a declaration with regard to four additional lawsuits, but DES has since withdrawn its request for a defense in those suits because they involved homes that were not constructed until after the end of the policies' coverage period.

The homeowners filed the underlying lawsuits in state courts throughout northern Texas from 2003 to 2005, asserting claims arising from water intrusion into the wall cavities of their homes due to an allegedly defective synthetic siding system known as Exterior Insulation and Finish Systems ("EIFS"). The EIFS at issue was distributed and sold by DBS and designed, manufactured, and marketed by other defendants. Specifically, the suits allege that the defendants knew that EIFS was defectively designed and would fail to serve as a weather-tight exterior cladding; that defendants knew that any wooden structures adjacent to EIFS would be at risk of wood rot and other damage because of the defective design; and that the defective EIFS allowed water to get inside the walls each time that it rained, causing extensive damage to the homes, a reduction in property values, and the need to retrofit or replace the EIFS. Each of the homeowners' petitions states that although the damage to the relevant home remained undiscovered until some point within two years of the filing of the suit,

> [the] injury to the home actually began to occur on the occasion of the first penetration of moisture behind the [EMS] which would have been at such time as the improperly installed sealant joints and sealants began to fail, allowing moisture within the system. Such failure would have been within six months to one year after the application of the EIFS . . . and such injury was continuous thereafter. Continuous and repeated exposure of the moisture sensitive substrates of the home to the elements, specifically rain and wind-driven rain, has resulted in an ongoing exposure to moisture and accumulation of water behind the [EIFS]. Each repeated moisture intru-

sion event has contributed to and worsened the damage to Plaintiffs' property.[2]

Faced with these lawsuits, DBS sought a defense from OneBeacon under the CGL policies, which cover a combined policy period from December 1, 1993 to December 1, 1996 (the "policy period"). All of the houses involved in the twenty-two underlying suits had EIFS installed at some point during the policy period. In relevant part, the CGL policies obligate OneBeacon to defend DBS in, and indemnify DBS against any liability arising from, any suit brought against DBS to recover for "property damage" that (1) is caused by an "occurrence" and (2) "occurs" during the policy period.[3] "Property damage" is defined as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

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[2] One of the suits uses different language but makes similar allegations.

[3] In relevant part, the policies provide: I. Insuring Agreement

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages . . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.

> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The central question before the district court was whether the property damage described in the underlying suits is alleged to have occurred within the policy period such that OneBeacon's duty to defend DBS was triggered under the CGL policies. To resolve this question, the court first had to identify the time at which Texas law deems property damage to occur for purposes of a CGL policy, and the court determined that it was bound by Fifth Circuit precedent holding that "property damage 'occurs' within the meaning of a CGL policy [under Texas law] . . . when the damage becomes manifest or identifiable." *Guar. Nat'l Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239, 246-47 (5th Cir. 2000); *see also Am. Home Assurance Co. v. Unitramp Ltd.*, 146 F.3d 311, 313 (5th Cir. 1998).

The district court then observed that each of the homeowners in the underlying suits pleaded the discovery rule in order to avoid the application of the statute of limitations for each of such homeowners' claims. *See generally Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990) (discussing the discovery rule). All but one of the homeowners pleaded the discovery rule as follows:[4]

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[4] The other homeowner's petition similarly alleges that "no reasonable means exist that would enable homeowners, such as Plaintiffs, to discover the damage occurring beneath the exterior surfaces of EIFS; thus, making the defect inherently nondis-

Discovery Rule Applies

> The injury to Plaintiffs was inherently undiscoverable in that the defects inherent in the EIFS are latent. The defects cause damage within the wall cavity which is not readily apparent to one examining the exterior of the EIFS surface. As a result, the named Plaintiffs would not, in the exercise of reasonable diligence, immediately perceive, observe or discover EIFS's defects.

Each petition indicates that the damage was discovered shortly before the filing of the relevant suit, and to avoid the statute of limitations for each claim but one, the damage had to be discoverable no earlier than two years before the filing of the suit.[5] Because the first of the suits was filed on August 13, 2003, none of the petitions alleges damage that could have been discovered before August 13, 2001, which was well after DBS's policy period expired in December 1996. Accordingly, the district court held that none of the pleadings alleges property damage that manifested during the policy period.

The district court also rejected DBS's contention that OneBeacon's duty to defend and indemnify was triggered by the homeowners' claims for loss of use of their property. The CGL policies dictate that a loss of

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coverable."

[5] A two-year limitations period applies to the underlying suits' claims for negligence, gross negligence, and violations of the Texas DTPA. TEX. CIV. PRAC. & REM. CODE § 16.003(a) (negligence and gross negligence); TEX. BUS. & COM. CODE § 17.565 (DTPA). A four-year limitations period applies to the fraud-based claims asserted in the underlying suits, TEX. CIV. PRAC. & REM. CODE § 16.004(a), but this difference did not affect the district court's analysis.

use of damaged property is deemed to occur at the time of the injury that caused it and that a loss of use of undamaged property is deemed to occur at the time of the occurrence that caused it. With regard to both types of property, the district court determined that the timing of the loss of use must be measured in the same way as the overall property damage—by looking to the time at which the damage causing the loss of use manifested. Because the court found that the pleadings do not allege property damage that manifested during: the policy period, the court held that OneBeacon has no duty to defend or indemnify DBS under any of the CGL policies' provisions.

III. LEGAL ISSUES

The Supreme Court of Texas has not yet adopted a particular rule for determining when property damage occurs for purposes of an occurrence-based liability policy, *see Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 853 n.20 (Tex. 1994), and the Texas appellate courts are split on the appropriate rule. The Courts of Appeals in Dallas, San Antonio, and Austin have held that property damage occurs at the time that the damage manifests, which the courts have further defined as the time that the damage becomes apparent or identifiable. *See, e.g., Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co.*, 202 S.W.3d 823, 827 (Tex. App.—Dallas 2006, pet. filed); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 322 (Tex. App.—San Antonio 2002, pet. denied); *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905, 910 (Tex. App.—Austin 1997, writ denied); *Cullen/Frost Bank of Dallas v. Commonwealth Lloyd's Ins. Co.*, 852 S.W.2d 252, 258 (Tex. App.—Dallas 1993, writ denied); *Dorchester Dev. Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380, 383 (Tex. App.—Dallas 1987, no writ).

The Courts of Appeals in Houston, however, have in two cases rejected this "manifestation rule" and instead applied an "exposure rule" to harms caused by continuous or repeated exposure to conditions during a policy period. In *Pilgrim Enterprises, Inc. v. Maryland Casualty Co.*, 24 S.W.3d 488, 490-91 (Tex. App—Houston [1st Dist.] 2000, no pet.), property owners alleged personal injury and property damage from long-term exposure to chemicals that entered the soil and groundwater from a neighboring dry cleaning facility. After surveying the Texas cases that applied the manifestation rule, the court held that "for CGL policies covering continuous or repeated exposure to conditions, [damage] can occur as the exposure takes place." Id. at 497-98. Similarly, in *Pine Oak Builders, Inc. v. Great American Lloyds Insurance Co.*, No. 14-05-00487-CV, 2006 WL 1892669, *7-8 (Tex. App.—Houston [14th Dist.] July 6, 2006, no pet.), the court applied the exposure rule to a case involving property damage from water intrusion due to defective EIFS siding.

Before the Houston Courts of Appeals adopted the exposure rule, the Fifth Circuit made its "*Erie* guess" on the matter and applied the manifestation rule, relying principally on the Dallas Court of Appeals cases. *See Azrock*, 211 F.3d at 246-47; *Unitramp*, 146 F.3d at 313; *Snug Harbor, Ltd. v. Zurich Ins.*, 968 F.2d 538, 544 (5th Cir. 1992). Given the present split in the Texas Courts of Appeals, we believe that the appropriate rule is better determined by the Supreme Court of Texas. Authoritative determination of the appropriate rule is necessary to resolve the remaining issue of whether the underlying pleadings allege that property damage occurred within the policy period such that OneBeacon has a duty to defend and indemnify DBS in the underlying suits.

Moreover, as the Supreme Court of Texas has not yet weighed in on the proper rule to be applied, it has not yet had occasion to clarify its scope. This case thus presents the additional determinative issue of whether property damage can be deemed to have occurred under the governing rule during a time in which the pleadings state that the damage was undiscoverable for purposes of the discovery rule. Although the petitions in the underlying suits allege that property damage began shortly after the EIFS installation and continued and progressed with each intrusion of water, which took place during the policy period, they also allege that the damage was hidden from view by the undamaged external EIFS surface and was not discoverable or readily apparent to someone looking at that surface until after the policy period ended.

The Texas Court of Appeals in Dallas considered the impact of the discovery rule in *Summit Custom Homes*, which involved a claimed duty to defend based on liability insurance that covered the period from 1996 to 2000. 202 S.W.3d 823. The focus of the parties' arguments centered on whether the underlying pleadings alleged actual damage caused by EIFS siding that manifested in 1996, and the court found that the pleadings did not, both because they did not specifically mention damage occurring in that year and because one of the petitions invoked the discovery rule, which was in a form similar to the invocation in this case.[6] *Id.* at 828. But despite the

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[6] The petition stated:

> Each and every claim made by the Plaintiffs herein is subject to the discovery rule because the defects of which Plaintiffs complain were latent and/or otherwise undiscoverable. The defects cause damage within the wall cavity which is not readily apparent to one examining the exter-

discovery rule's apparent applicability in that case to at least the year 1996, the court ultimately found that the insurer failed to establish as a matter of law that the damage did not manifest during any of the policy years, including 1996. *See id.* at 828, 830.

Our court has interpreted another Dallas Court of Appeals case as establishing that hidden damage is not apparent for purposes of the manifestation rule. *See Unitramp*, 146 F.3d at 314. *Cullen/Frost* involved allegations of warped floors and rotten woodwork, among other structural problems, that were only discovered after a professional inspection, and the court recognized "that [liability] coverage is not afforded unless an identifiable damage or injury, other than merely causative negligence, takes place during the policy period." 852 S.W.2d at 258. In *Unitramp*, our court rejected the claim that the use of the word "identifiable" as the relevant gauge in *Cullen/Frost* means "capable of being known by testing." *Unitramp*, 146 F.3d at 314. Instead, we held that "identifiable" was synonymous with "manifest" and "apparent," which we further defined as "capable of easy perception." *Id.* Our court then concluded that "in Cullen/Frost, the structural deterioration in condominium units was not apparent because it was hidden; the floor displacement and rotten woodwork were not readily observable by the senses. Accordingly, the problems did not become apparent until the owners conducted inspections," *Id.*

As with the question of the proper rule for determining when property damage is deemed to occur

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ior of the EIFS surface. As a result, the named Plaintiffs would not, in the exercise of reasonable diligence, immediately perceive, or discover the defects complained of herein.

Summit Custom Homes, 202 S.W.3d at 828.

under Texas law, the impact of the discovery rule's invocation on that analysis is also better decided by the Supreme Court of Texas. A ruling on this issue is determinative of whether the pleadings in the underlying suits allege property damage that occurred during the policy period, thereby determining whether OneBeacon has a duty to defend and indemnify DBS. If the underlying pleadings' allegations of hidden but progressing damage are sufficient to allege covered damage notwithstanding the undiscoverability language, then OneBeacon has a duty to defend and indemnify DBS. If instead the allegations that the damage was undiscoverable and not readily apparent until after the policy period are sufficient to allege that the damage did not occur during the policy period, then OneBeacon has no duty to defend or indemnify DBS.

IV. QUESTIONS CERTIFIED

We hereby certify the following two determinative questions of law to the Supreme Court of Texas:

1. When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for purposes of an occurrence-based commercial general liability insurance policy?

2. Under the rule identified in the answer to the first question, have the pleadings in lawsuits against an insured alleged that property damage occurred within the policy period of an occurrence-based commercial general liability insurance policy, such that the insurer's duty to defend and indemnify the insured is triggered, when the pleadings allege that actual damage was continuing and progressing during the policy period, but remained undiscoverable and not readily apparent for purposes of the

discovery rule until after the policy period ended because the internal damage was hidden from view by an undamaged exterior surface?

We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified.

APPENDIX O

APPEAL FROM CIVIL DISTRICT COURT,
ORLEANS PARISH

NO. 2006-9276, DIVISION "G-11"

JOSEPH SHER

v.

LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.

Honorable Robin M. Giarrusso, Judge

* * * * *

Judge Terri F. Love

* * * * *

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, HI, Judge Terri F. Love, Judge Max N. Tobias, Jr., and Judge Leon A. Cannizzaro)

MURRAY, J., CONCURS IN THE RESULT
TOBIAS, J., CONCURS IN THE RESULT AND ASSIGNS REASONS.
CANNIZZARO, J., CONCURS IN PART AND DISSENTS IN PART

James M. Garner
Darnell Bludworth
Lauren L. Hudson
Timothy B. Francis

SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
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November 19, 2007

This appeal arises from an insurance claim resulting from damages related to Hurricane Katrina. Joseph Sher, the owner of a five-unit apartment building in New Orleans, contested the claim determination of his commercial insurer, Lafayette Insurance Company. Lafayette Insurance Company refused to pay additional funds asserting that Joseph Sher's property was not properly maintained and that the policy did not cover flood damages. The trial court held that the insurance policy was ambiguous and therefore covered flood damage. A jury determined Joseph Sher's damage awards and the trial court awarded attorney's fees and costs.

Lafayette asserts that the insurance policy is not ambiguous and that the damage awards are excessive. Joseph Sher alleges the trial court erred by not allowing evidence and jury charges relating to his alleged mental anguish. We find the insurance policy ambiguous and affirm the trial court's granting of the partial motion for summary judgment. We find that the 2006 amendments to La. R.S. 22:658 cannot be applied retroactively and adjust the penalty award

accordingly. The trial court erred in awarding attorney's fees; therefore, we vacate the award. Lastly, we find the jury properly determined the property damage amounts and affirm as amended

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Hurricane Katrina ("Katrina") brought catastrophic loss to New Orleans on August 29, 2005. With the naturally occurring storm also came the failure of the levee system built and maintained by the United States Army Corps of Engineers. causing New Orleans to be inundated with water. Joseph Sher ("Mr. Sher") owned and lived in a five-unit apartment building ("Building") located at 1410 Broadway Street. Three weeks prior to Katrna, Mr. Sher suffered three heart attacks, which required surgery and a hospital stay. He thought evacuating would be too strenuous and decided to remain in his apartment during the mandatory evacuation period.

During Katrina, Mr. Sher said that the Building shook, water came in around the windows, and it appeared that the walls were "weeping." Early Tuesday morning, August 30, 2005, Gayle Parmelee, one of Mr. Sher's tenants who remained with Mr. Sher in the Building during the mandatory evacuation period, observed water rising around the Building. The water inundated the basement level of the Building with approximately four feet of water. Mr. Sher later evacuated the Building in a canoe and traveled to Baton Rouge to reside with one of his sons.

Mr. Sher first obtained his commercial all-risk[1] insurance policy ("Policy") on the Building with Lafay-

[1] Tom Miller, a United Fire and Casualty Company claims supervisor, testified that an "all-risk" insurance policy covers

ette Insurance Company ("Lafayette") in 1989. Mr. Sher[2] notified Lafayette of his insurance claim during. the first or second week of September 2005. Lafayette assigned Mr. Sher's claim to Property Loss Consulting, Inc. ("PLC") around October 5, 2005, when Lafayette asserts it first learned of the claim. Following the initial inspection of the Building, Lafayette determined that most of the damage to the Building was not covered under the Policy because the damage was caused by lack of maintenance, disrepair, or flooding. Lafayette estimated Mr. Sher's covered damages at S3,307.09. Lafayette then subtracted a hurricane deductible of $1,000 and a premium price of $2,037, which meant Mr. Sher was issued a check for $270.09. Mr. Sher then began to dispute the covered damages with Lafayette.

Following a second inspection conducted by Fred Vanderbrook ("Mr. Vanderbrook"), a consulting engineer retained by Lafayette for inspection of the roof and interior of the Building, Lafayette issued a supplemental check to Mr. Sher for $2,484.99. Neither check was ever negotiated. Mr. Sher forwarded additional estimates and invoices for repairs to Lafayette that he felt the Policy covered. Lafayette did not tender payment for the estimates or invoices.

Mr. Sher filed a petition for insurance coverage, bad faith penalties, attorney's fees and costs, and bad faith breach of insurance contract on August 28, 2006, against Lafayette; United Fire and Casualty Company ("UFC"); the United Fire Group ("LTG"); Robert

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"all risks except those that are excluded or limited within the policy."

[2] Mr. Sher communicated with Lafayette throughout the process via his son Leopold Sher.

Jones ("Mr. Jones"); Wes Swank ("Mr. Swank"); Mr. Vanderbrook; and PLC. Lafayette asserted the declinatory exception of lis pendens in its answer, which was dismissed. UFC and LTG then filed a motion for summary judgment as a matter of law asserting that Mr. Sher had no claims regarding their liability. Mr. Sher then dismissed UFC and LTG without prejudice.

Mr. Vanderbrook filed a dilatory exception of vagueness/ambiguity. Mr. Sher then dismissed Mr. Vanderbrook without prejudice.

Lafayette then filed a motion for leave to file a third party demand against R. David Paulison. as the director of the Federal Emergency Management Agency, FEMA, and the National Flood Insurance Program ("NFIP"). which the trial court denied due to time constraints of the impending trial.

Mr. Sher filed a motion for partial summary judgment as a matter of law against Lafayette that the Policy covered his damages. The trial court then granted Mr. Sher's motion for partial summary judgment holding that the flood exclusion contained in the Policy was ambiguous; therefore, it covered "man-made events." Additionally, the trial court held that "Lafayette has not met its burden of proving" that Mr. Sher's "damage was not caused by a man-made event." Lastly, the trial court denied Lafayette's motion to strike an expert witness or to continue the trial.

Lafayette filed a motion in limine to exclude new theories of recovery not disclosed prior to trial, which the trial court granted. Mr. Sher then filed a motion in limine to exclude limitations or exclusions not properly pled in Lafayette's answer as affirmative de-

fenses, which the trial court granted finding that each exclusion or limitation needed to be specifically pled.

Lafayette followed with a motion in limine to exclude prejudicial statements. Lafayette wanted to preclude Mr. Sher from revealing to the jury that he was a Holocaust survivor. The trial court denied the motion to exclude prejudicial statements regarding the Holocaust on a limited basis.

The trial court bifurcated the trial into two phases, with the second phase pertaining only to the alleged arbitrary and capriciousness of Lafayette. After a five-day trial, including both phases, the jury awarded damages as follows:

Building Damage Above the Basement	$ 175.850
Building Damage in the Basement	$ 144,300
Lost Rents	$ 17,350
Business Personal Property	S 31,577
Penalties Pursuant to La. R.S. 22:658	$ 184,538.50
TOTAL	$ 553,615.50

The trial court reserved the amount of attorney's fees and costs, plus interest from the date of judicial demand until paid, for determination at a later date. Following the trial, Mr. Sher dismissed and reserved his rights against Mr. Jones, Mr. Swank, and PLC.

Lafayette filed a motion for a new trial or alternatively remittitur, which was denied. Lafayette then timely filed this suspensive appeal. The trial court assessed attorney's fees and costs as follows:

Costs Pursuant to La. C.C.P. art. 1920	$ 16,288.60
Costs Pursuant to La. C.C.P, art, 970	$ 42,020.24
Attorney's Fees Pursuant to La. C.C. art. 1997 and/or La. R.S. 22:658	$ 258,728
TOTAL	$317,036.84

Thus, the total amount assessed against Lafayette was $870,652.34.

Lafayette appeals asserting that the trial court erred by: 1) granting Mr. Sher's motion for partial summary judgment 2) retroactively applying an amendment to La, R.S. 22:658; 3) awarding $258,728 in attorney's fees; 4) striking defenses other than flood and NFIP; 5) not allowing a credit for Mr. Sher's NFIP policy; 6) awarding $42,020.24 in costs pursuant to La. C.C.P. art, 970; 7) awarding legal interest on penalties and attorney's fees from the date of judicial demand; 8) entering judgment on the jury's finding of arbitrary and capriciousness; 9) entering judgment on the jury's award of $31,577 for business personal property ("BPP"); 10) entering judgment on the jury's award for lost rents; and 11) entering judgment on the jury's award for building damages. Mr. Sher answered the appeal asserting that the trial court erred in refusing to instruct the jury regarding damages for mental anguish and that the jury interrogatories should have included an opportunity to award such damages.

PARTIAL SUMMARY JUDGMENT

Lafayette asserts the trial court erred by granting Mr. Sher's motion for partial summary judgment and determining that the meaning of flood in the context of the Policy was ambiguous.

Appellate courts review summary judgments using the *de novo* standard of review. *Denson v. Diamond Offshore Co.*, 06-0568, p. 3 (La App. 4 Cir. 3/28/07), 955 So. 2d 730, 732. To find genuine issues of material fact, the reviewing court examines the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." La.

C.C.P, art. 966(B). If no genuine issues of material fact exist and the "mover is entitled to judgment as a matter of law," then summary judgment should be granted. La. C.C.P. art. 966(8). The mover bears the burden of proof. La. C.C.P. art, 966(C)(2).

An insurance policy is a contract.[3] The Louisiana Civil Code states that the "[i]nterpretation of a contract is the determination of the common intent of the parties." La, C.C, art. 2045. Further, "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La, C.C, art 2046, If a word in a contract is not defined in the document, it must be given its "generally prevailing meaning." La. C.C. art. 2047. However, "[w]ords susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract." La. C.C. art. 2048. When determining the meaning best conforming to the object of the contract, the meaning must be one that renders it effective and not one that renders it ineffective. La. C.C. art. 2049.

Provisions of a contract must be interpreted along with the contract in totem. La. C.C. art, 2050. Although worded in general terms, a contract "must be interpreted to cover only those things it appears the parties intended to include." La. C.C. art. 2051. "When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or

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[3] "A contact is an agreement by two or more parries whereby obligations are created, modified, or extinguished" La. C.C. art 1906.

usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose." La. C.C. art. 2054. Ultimately, if doubt exists, "a provision in a contract must be interpreted against the party who furnished its text," La. C.C. art 2056. Thus, "[a] contract executed in a standard form of one parry must be interpreted, in case of doubt, in favor of the other party." La. C.C. art. 2056.

The Policy contains the following water exclusion, in pertinent part:

> B. EXCLUSIONS
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> g. Water
>
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
> (2) Mudslide or mudflow;
> (3) Water that backs up from a sewer or drain; or
> (4) Water under the ground surface pressing on, or flowing or seeping through:
> (a) Foundations, walls. floors or paved surfaces;
> (b) Basements, whether paved or not; or
> (c) Doors, windows or other openings.

The Policy also contains a section entitled "SECTION V—DEFINITIONS," which includes the definitions of

words used in the policy. However, "flood" is not defined in this section.

The common intent of the parties in an insurance contract is to provide insurance coverage. The meaning of "flood" is not defined within the Policy. Therefore, it must be given its generally prevailing meaning. However, because "flood" is susceptible to different meanings due to varying causes of floods, we must find a meaning that conforms to the object of the contract, which also renders the contract effective.

A review of the Policy reveals that the parties intended to cover and include all risks that were not specifically excluded or limited. Lafayette failed to specifically exclude all floods because of the ambiguity contained within the water exclusion. While the Policy states that it does not cover damage caused by a "flood," it also states that it does not cover "waves, tides, tidal waves." and the "overflow of any body of water whether driven by the wind or not," This exclusion includes "flood," but then continues to list specific natural disasters that cause inundations of water, commonly labeled as "floods." For example, a varying cause of a flood can be man-made or natural, as documented in La. R.S, 29:762. which states that a "flood" is a "natural disaster."[4]

A contract must be interpreted to achieve its purpose. La. C.C. art. 2054. The purpose of the Policy was to provide insurance coverage for all risks not specifically excluded or limited. Therefore, in case of any doubt, when interpreting a contract of a standard

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[4] La RS, 29:762 Definitions reads, in pertinent part:
(12)(a)(iii) A disaster. including but not limited to natural disasters such as hurricane, tornado, storm, flood

form, the contract must be interpreted against Lafayette as the issuer of the Policy.

As such, after a *de novo* review, we make the legal determination that the Policy with Lafayette is ambiguous as it relates to the water exclusion because it is unclear what types of floods are excluded. Therefore, strictly construed against Lafayette, Mr. Sher is covered for the damage to the basement level of the Building.

MENTAL ANGUISH

Mr. Sher asserts that the trial court erred by refusing to instruct the jury as to general damages for mental anguish, inconvenience, and emotional distress.[5] He requested that the trial court include the following jury charges:

> Plaintiff's Proposed Jury Charge Regarding General Damages
> A finding that an insurance company breached the duty owed to its insured of good faith and fair dealing, pursuant to Louisiana Revised Statutes 22:I220, entitles the insured to recover penalties against the insurer for "any damages sustained as a result of the breach." Such damages may include general damages for mental anguish and emotional distress associated with the pursuit of the insurance claim, as well as aggravation and inconvenience.
> La. R.S. 22:I220
> *Lewis v. State Farm Ins. Co.*, 4I,527 (La. App. 2 Cir. I2/27/06), 946 So. 2d 708, 728.

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[5] The trial court denied the admittance of the requested jury charges and proffered Mr. Leopold Sher's testimony regarding Mr. Sher's alleged mental anguish.

Reed v. Ricard, [sic] 97-2250 (La, App. 1 Cir. I1/18/98), 744 So. 2d 13, 19.
Williams v. La. Indemn. Co., 26,887 (La. App. 2 Cir. 6/2I/95), 658 So_ 2d 739, 743.

Plaintiff's Proposed Jury Charge Regarding Mental Anguish
The finding that an insurance company violated Louisiana Civil Code Article 1997 by engaging in a bad faith breach of contract supports an award of damages for inconvenience, anguish and the like resulting from the actions of the defendant.
La. C.C. art. 1997.
Modisette v, Am. Integrity Ins. Co., 297 So. 2d 498 (La. App. 2nd Cir. 1974),

Plaintiffs Proposed Jury Charge Retarding Mental Anguish
Damages for nonpecuniary losses such as emotional distress and mental anguish are also available under Louisiana Civil Code Article 1998, which allows recovery of such damages where the contract is intended to gratify a nonpecuniary interest.

The nonpecuniary interest need only be a "significant" object or cause of the contract, as opposed to the primary or exclusive object of the contract for such damages to be recoverable. Damages for nonpecuniary losses can be recovered where the contract is intended to gratify both pecuniary and nonpecuniary interests. Contracts pertaining to plaintiffs residence can satisfy such an objective.
La. C,C. art, I998.
Young v. .Ford Motor Co., 595 So. 2d 1123, 1124 (La. 1992).

Thomas v. Desire Comm. Hous_ Corp., 98-2097 (La. App. 4 Cir. 7/19/00), 773 So. 2d 755, 763_ *Taylor v. Burton*, 93-1348 [sic] (La. App. 3 Cir. 3/6/98), 708 So. 2d 531, 535-36,

Mr. Sher requests that this Court award him general damages of $500,000 for mental anguish, inconvenience, and emotional distress.

Rejecting a requested jury instruction constitutes an error of law when it is "prejudicial" by "materially" affecting the result and depriving "a party of substantial rights." *Lam v. State Farm Mut. Auto. Ins. Co.*, 03-0180, p, 4 (La, App, 4 Cir. 4/1/05), 901 So, 2d 559. 564, *rev'd in part on other grounds*, 05-1139 (La, 11/29/06), 946 So. 2d 133. The manifest error standard presumes the jury utilized the correct law. *Rathey v. Priority EMS, Inc.*, 04-0199, p. 27 (La. App. 4 Or. I/12/05), 894 So. 2d 438, 458, *writ denied*, 05-0789 and 05-0802 (La. 5/6/05), 901 So. 2d 1107, 1108.

De novo review will be used by the appellate court "if the jury applied the incorrect law because of erroneous jury instructions" and it "could have affected the jury's decision." *Rathey*, 04-0199, pp. 27-28, 894 So. 2d at 459. "*De novo* review is used only if the jury charges precluded 'the jury from reaching a verdict based on the law and the facts.'" *Chaisson v. Avondale Indus,, Inc.*, 05-1511, p. 27 (La. App. 4 Cir. 12/20/06), 947 So. 2d 171, 190, *quoting Jones v. Liberty Mut. Ins. Co.*, 568 So. 2d 1091, 1094 (La. App. 5th Cir. 1990). "Ultimately, the determinative question is whether the jury instructions misled the jury to the extent that it was prevented from dispensing justice." *Nicholas v. Allstate Ins. Co.*, 99- 2522, p. 8 (La. 8/31/00), 765 So. 2d 1017, 1023.

"[I]t is well established that damages for mental anguish are recoverable in tort actions." *Gele v. Markey*, 387 So. 2d 1162. 1164 (La. 1980), The damages sought by Mr. Sher "are not recoverable for breach of lease or of any contract unless psychological gratification was the primary object of the contract." *Buddy's Tastee No, 1, Inc. v. Tastee Donuts, Inc.*, 483 So. 2d 1321, 1324 (La. App. 4th Cir. 1986). However, "courts have been willing to compensate victims of mental distress in contract cases which have elements of tort actions." *Id*, "[B]are allegations of depression and embarrassment" are not sufficient. *Id.* Louisiana law dictates "that the object of a contract of insurance is the payment of money." *Dixon v. First Premium Ins. Group*, 05-0988, p. I6 (La, App, I Cir. 3/29/06), 934 So. 2d 134, 146, *writ denied*, 06-0978 (La. 6/16/06), 929 So. 2d 1291.

The case *sub judice* presents a contract of insurance, the object of which is to pay money. There is no evidence that psychological gratification or nonpecuniary interests was the object of this Policy. The proffered testimony of Mr. Leopold Sher addresses Mr. Sher's alleged mental anguish. Mr. Leopold Sher contended that Mr. Sher was "sick in his heart and mentally and emotionally upset every single day." However, the record lacks evidence of Lafayette's actions, other than failure to pay, that would demonstrate that "the obligor intended, through his failure, to aggrieve the feelings of the obligee." La. C.C. art. 1998. The evidence in the record does not rise to the level that would merit the award of mental anguish damages in a contractual based action as opposed to a delictual based action. As such, we find that the trial court did not commit an error of law by refusing to include Mr. Sher's proposed jury instructions as he

was not materially or prejudicially affected or deprived of substantial rights.

FLOOD INSURANCE POLICY CREDIT

We pretermit the discussion of Lafayette's claim for a credit for flood insurance policy payments as no evidence in the record exists to establish Mr. Sher received payments from the NFIP.

STANDARD OF REVIEW

The remaining issues in the case *sub judice* pertain to factual determinations, legal issues, and damage awards, which require the appellate court to utilize the following standards of review.

Factual determinations are reviewed with the manifestly erroneous/clearly wrong standard. *Rosell v ESCO*, 549 So. 2d 840, 844 (La. 1989). Reviewing and reversing the factfinder's determinations involves a two-part test developed by the Louisiana Supreme Court. *Mart v. Hill*, 505 So. 2d 1120, 1127 (La. 1987). The reviewing court must find that no reasonable factual basis exists for the trial court's findings and that the findings are wrong or "manifestly erroneous" according to the record. *Id.* The entire record must be reviewed to determine whether the factfinder was clearly wrong, *Stobart v.. State, Through Dept. of Transp. and Dev.*, 617 So. 2d 880, 882 (La. 1993). The factfinder has a "better capacity to evaluate live witnesses." *Canter v. Koehring Co.*, 283 So, 2d 7I6, 724 (La. 1973), Thus, "the appellate court must determine if the factfinder's decision was a reasonable one." *Norfleet v. Lifeguard Transp. Serv,, Inc.*, 05-0501, p. 5 (La. App. 4 Cir. 5/17/06), 934 So. 2d 846, 852. "[W]here two permissible views of the evidence exist, the factfinder's choice between them cannot be mani-

festly erroneous or clearly wrong." *Stobart*, 617 So. 2d at 883.

Damage awards by the factfinder are not altered or reversed absent an abuse of discretion. Factfinders have "much discretion" when assessing damages. La. C.C. art. 2324.1. The damage amount is "entitled to great deference on review." *Trunk v. Med. Ctr of La. at New Orleans.*, 04-0181, p, 9 (La, 10/19/04), 885 So, 2d 534, 539, citing *Wainwright v. Fontenot*, 00-0492, p. 6 (La. 10/17/00), 774 So. 2d 70, 74. Accordingly, the abuse of discretion standard is utilized. *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257, 1260 (La, 1993). Notwithstanding opposing viewpoints on an appropriate award, an abuse of discretion is found only if the award is "beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances." *Id.* 623 So. 2d at 1261

Legal errors are reviewed by appellate courts with a *de novo* standard. *Overton v. Shell Oil Co.*, 05-1001, p, 8 (La. App. 4 Cir. 7/19/06), 937 So. 2d 404, 410.

STRICKEN DEFENSES

Lafayette avers the trial court legally erred by not allowing it to present defenses other than the water exclusion and payments made under an NFIP policy. The trial court held that Lafayette did not specifically plead all of the exclusions from the Policy as affirmative defenses;[6] thus, the exclusions/limitations were waived. Lafayette's Answer included the following language:

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[6] As determining what constitutes an affirmative defense is a question of fact, we do not find that the trial court committed manifest error by labeling Lafayette's other defenses as affirmative defenses.

> Lafayette adopts the terms, conditions, coverages, exclusions and endorsements of its policy, as if copied herein in extensio, [sic] as a defense to petitioner's claims; Lafayette further pleads all defenses, exclusions, rights and remedies under the policy of insurance issued by Lafayette to petitioner.

Lafayette asserts that this pled the Policy in its entirety as an affirmative defense.

"[A] defendant's answer must set forth any matter constituting an affirmative defense." *Pendleton v. Smith*, 95-1805, p. 5 (La. App. 4 Cir. 5/8/96), 674 So. 2d 434, 437. See La. C.C.P. art. I005. "An affirmative defense raises a new matter, which assuming the allegations in the petition are true, constitutes a defense to the action." *Allvend, Inc. v. Payphone Comm'ns Co.*, 00-0661, p. 5 (La. App. 4 Cir,. 5/23/01), 804 So. 2d 27, 30. The list of affirmative defenses contained in La. C,C.P. art. 1005 is "illustrative, not exclusive." *Bienvenu v. Allstate Ins. Co.*, 012248, p. 5 (La. App. 4 C11. 5/8/02), 8I9 So. 2d 1077, 1079. "Whether an issue is an affirmative defense is a question of fact, determined by the circumstances of the individual case," *Bienvenu*, 01-2248, p. 5, 819 So. 2d at 1080. "Reliance upon an exclusion in an insurance contract is considered to be an affirmative defense, which must be specially pleaded in defendant's answer," *Pendleton*, 95-1805, 674 So. 2d at 437. "In the absence of such a pleading, no proof can be offered in connection with the exclusion." *Id.*

The purpose of specifically pleading an affirmative defense is to give fair notice to the plaintiff of the nature of defenses. *Bienvenu*, 01-2248, p. 6, 819 So. 2d at 1080. Special pleading prevents "trial by ambush" and does not give the defendant an unfair ad-

vantage. *Walters v. Metro Erection Co.*, 94-0162 and 94-0475 (La. App. 4 Cir. 10/27/94), 644 So. 2d 1143, 1147. Pleading an insurance policy "in extenso' does not meet the requirement that affirmative defenses be specifically pled. *Dixie Sav. and Loan Ass'n v. Pitre*, 99-154, pp, 23-24 (La. App. 5 Cir. 7/27/99), 75I So. 2d. 911, 924-25, *writ denied*, 99-2867 (La. I2/10/99), 751 So. 2d 855.

Lafayette refers to two cases to support the assertion that pleading an insurance policy in extenso is sufficient as a general rule.. Lafayette asserts that *Brantley v. State Farm Ins. Co.*, 37,601 (La. App. 2 Cir. 1/28/04), 865 So. 2d 265, and *Levet v. Calais & Sons, Inc*,, 5I4 So. 2d 153 (La. App. 5th Cir. 1987), maintain the proposition that Louisiana appellate courts have ruled that pleading the policy is sufficient. We find these cases distinguishable from *Dixie*. as the cases do not establish a general rule that pleading a policy in its entirety complies with the requirements of La. C.C.P, art. I005.

In *Brantley*, the trial court allowed the defendant to submit a handwritten answer, which asserted "all defenses under the policy" on the day of trial, 37,601 at pp, 8-9, 865 So, 2d at 270. The plaintiffs alleged that they were prejudiced by the ruling because no continuance was granted. *Brantley*, 37,601. p. 8, 865 So. 2d at 270. The trial court gave the plaintiffs an opportunity to file a motion for summary judgment following the filing of the answer and prior to the recommencement of trial, which they declined. *Id*. The appellate court found that "[b]ased upon this record," the trial court was not clearly wrong "in finding that the answer was sufficient and in denying the motion to strike," *Brantley*, 37,60I, p. 9, 865 So. 2d at 270.

Similarly limited to particular facts and circumstances, in *Levet*, the defendant and the defendant's insurer pled the insurance policy "in extenso." 514 So, 2d at 160. However, the defendant and the plaintiffs opposed the insurer's motion to limit liability based on the fact that the policy limits were not specifically pled, *Levet*, 514 So, 2d at 160. The appellate court found that the policy limit was deemed admitted because of the failure to respond to a request for admissions. *Id.* Like *Brantley*, the appellate court did not hold as a general rule that pleading a policy "in extenso" was sufficient to comply with La. C.C.P., art. 1005. Thus, neither appellate court found, as a general rule, that specific provisions of an insurance policy, intended to be used as affirmative defenses, need not be pied if the answer states that the defendant pleads the policy or the policy in extenso.

Thus, given the nature and purpose of affirmative defenses and that Lafayette did not specifically plead defenses other than NFIP and the water exclusion, we find that the trial court did not commit legal error in precluding the presentation of other defenses, as in extenso is insufficient to plead other exclusions and limitations of the Policy.

BUSINESS PERSONAL PROPERTY

Lafayette maintains that the trial court committed legal error by allowing evidence of Mr. Sher's BPP into evidence and submitting the issue to the jury because it claims the Policy did not cover Mr. Sher's BPP due to the lack of a BPP limit or information on the declarations page of the Policy. However, Lafayette failed to plead that the Policy did not cover BPP as an affirmative defense. Additionally, Lafayette never raised it in a reservation of rights. Thus, Mr, Sher asserts that this affirmative defense was

waived. Lafayette moved for a directed verdict on the issue of BPP at the close of Mr. Sher's case-in-chief, which the trial court denied

The Policy states, on the "Building and Personal Property Coverage Form,- in pertinent part:

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss,

1. Covered Property

Covered Property, as used in this Coverage Part, means the following types of property for which a Limit of Insurance is shown in the Declarations:

a. Building meaning the building or structure described in the Declarations, including:

(1) Completed additions;

(2) Permanently installed:

(a) Fixtures;

(b) Machinery; and

(c) Equipment;

(3) Outdoor fixtures;

(4) Personal property owned by you that is used to maintain or service the building or structure or its premises. including:

(a) Fire extinguishing, equipment;

(b) Outdoor furniture;

(c) Floor coverings; and

(d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;

The form referenced above also includes the following section regarding BPP in pertinent part:

b. Your Business Personal Property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property—Separation of Coverage form:

(1) Furniture and fixtures:

(2) Machinery and equipment;

(3) "Stock;"

(4) All other personal property owned by you and used in your business;

(5) Labor, materials or services furnished or arranged by you on personal property of others;

(6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:

(a) Made a part of the building or structure you occupy but do not own; and

(b) You acquired or made at your expense but cannot legally remove;

(7) Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property of Others.

Mr. Sher submitted a list of the contents he lost and the respective values into evidence. All of the items reported on Mr. Sher's list are covered by either the section under "building coverage," "BPP," or both. Irrespective of a finding that Lafayette waived the argument that the Policy does not cover BPP, there is not a definitive statement that the Policy does not include BPP. There is merely no reference to BPP specifically on the declaration page in the Policy.

This creates ambiguity that is construed against Lafayette. Therefore, we find that the trial court did not commit legal error and the jury was neither manifestly erroneous nor abused its discretion by awarding Mr. Sher $31,577 for BPP.

LOST RENTS

Lafayette contends the trial court erred by entering judgment on the jury's award for $17,350 in lost rents. Lafayette claims the lost rents award should be reduced to $4,600 because it states the loss from Apartment E was based on flood damage and the loss from Apartments A and C was based on post-Katrina valuations. In order to arrive at $4.600, Lafayette did not include $8,550 for Apartment E and used the pre-Katrina valuations of $700 a month for Apartments A and C.

Mr. Leopold Sher, Mr. Sher's son, testified as to the amount of rent Mr. Sher lost following Katrina because of the damage to the Building. He stated that the rent for both Apartments A and C prior to Katrina was $700 each and Apartment E was $450. He further stated that, after reviewing the prices in the post-Katrina market, both Apartments A and C each had a monthly value of $1,400 and Apartment E $450. Mr, Sher also testified as to these valuations. The jury determined Mr. Sher's lost rents as follows:

Apartment A $400 + ($1,400 x 2 months)	$3,200
Apartment C: $1,400 x 4 months	$5,600
Apartment E $450 x 19 months	$ 8.550
TOTAL	$17,350

The Policy includes a section on business income coverage, which reads, in pertinent part-.

A. COVERAGE

> Coverage is provided as described below for one or more of the following options for which a Limit of Insurance is shown in the Declarations:
>
> (i) Business Income including "Rental Value".
>
> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration",

The Policy covers Mr. Sher's "actual loss" of business income.

As we found above, the ambiguous water exclusion in the Policy covers floods. Therefore, we find Lafayette's assertion as to the lost rents from Apartment E without merit. With respect to Apartment A and C. we find that the jury's award was not manifestly erroneous because the Policy covers actual loss. The jury had the opportunity to weigh Mr. Sher and Mr. Leopold Sher's credibility as to their study of post-Katrina valuations. If Mr. Sher could have leased Apartments A and C post-Katrina, then, according to Mr. Leopold Sher's testimony regarding the new rental market, he would have been able to collect $1,400 a month on each apartment. Therefore, we affirm the award of lost rents as the jury did not commit manifest error or abuse its discretion.

> Coverage is provided as described below for one or more of the following options for which a Limit of Insurance is shown in the Declarations:
>
> (i) Business Income including "Rental Value".
>
> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration",

The Policy covers Mr. Sher's "actual loss" of business income.

As we found above, the ambiguous water exclusion in the Policy covers floods. Therefore, we find Lafayette's assertion as to the lost rents from Apartment E without merit. With respect to Apartment A and C. we find that the jury's award was not manifestly erroneous because the Policy covers actual loss. The jury had the opportunity to weigh Mr. Sher and Mr. Leopold Sher's credibility as to their study of post-Katrina valuations. If Mr. Sher could have leased Apartments A and C post-Katrina, then, according to Mr. Leopold Sher's testimony regarding the new rental market, he would have been able to collect $1,400 a month on each apartment. Therefore, we affirm the award of lost rents as the jury did not commit manifest error or abuse its discretion.floods. Therefore, we find Lafayette's assertion as to the lost rents from Apartment E without merit. With respect to Apartment A and C. we find that the jury's award was not manifestly erroneous because the Policy covers actual loss. The jury had the opportunity to weigh Mr. Sher and Mr. Leopold Sher's credibility as to their study of post-Katrina valuations. If Mr. Sher could have leased Apartments A and C post-Katrina, then, according to Mr. Leopold Sher's testimony regarding the new

rental market, he would have been able to collect $1,400 a month on each apartment. Therefore, we affirm the award of lost rents as the jury did not commit manifest error or abuse its discretion.

BUILDING DAMAGES

Lafayette maintains that Mr. Sher's building damages should be reduced for the following reasons: 1) forty-five percent allowance for overhead and profit is gouging; 2) "water hammer" damages are not covered under the Policy; 3) there was no evidence of structural damage; 4) the jury's verdict is in excess of the amounts estimated by $50,000; and 5) Lafayette should get a credit for amounts paid.

GOUGING

The jury awarded Mr. Sher $320,150 for damages to the Building. Lafayette asserts that the award reflects a forty-five percent allowance for overhead and profit Barry Scairono ("Mr. Scairono"), Mr. Sher's expert in architecture; water intrusion analysis; roofing; cost estimation; and construction administration, provided the estimates for repairing the upper level and basement level of the Building, which contained a twenty-five percent allowance for overhead and profit and a twenty percent allowance as an amount for unknown contingencies.

Mr. Scairono prepared an "opinion of probable repair costs" for the damage to the upper level of the Building and another for damage to the basement level of the Building. Mr. Scairono's estimates for repairs to the upper level and basement level of the Building were $134,850 and $144,300. respectively. These estimations included a twenty-five percent allowance for overhead and profit. Mr. Scairono

testified that twenty-five percent was "reasonable" and "typical" for an overhead and profit allowance. He also stated that the Louisiana Office of State Facility Planning and Control, the entity that does the construction for the Louisiana, allows for a twenty-five percent allowance. A separate cost of twenty percent was included for contingency purposes. Mr. Scairono described the contingency as money included for "unidentified costs in construction jobs."

Lafayette combined the percentage allocated for overhead and profit with that for contingency. However, due to the testimony of Mr. Sciarono, which differentiated the two calculations, we find neither manifest error nor abuse of discretion in the jury's determination.

WATER HAMMER

Lafayette avers that damages associated with the "water hammer" effect[1] should be subtracted from the jury's award because it was not covered under the Policy. However, the trial court ruled that Lafayette was precluded from asserting additional affirmative defenses that it did not specifically plead. We affirmed the ruling regarding additional affirmative defenses. Therefore, we find that this argument is precluded.

STRUCTURAL DAMAGE

Further, Lafayette contends that the award for structural damage should be reduced because Mr. Sher alleges structural damage that was not

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[1] The "water hammer" effect results from a sudden increase in water pressure, which can burst water main and pipes, etc

proven. Lafayette also avows that the amount the jury awarded Mr. Sher to inspect for structural damage should be deducted from the building damages award.

Roy Carubba ("Mr. Carubba"), Mr. Sher's expert in civil engineering, with a subspecialty in structural engineering, and as a contractor, testified that the Building cracked because it shook for two to three hours. Mr. Carubba testified that the porch moved from the wind and that constituted structural damage. He also stated that he believes there is "underlying structural damage" to the Building, but that cracks could appear without structural damage. In order to repair the structural damage he observed in the Building, Mr. Carubba stated it would cost approximately $42,410. Mr. Sciarono also testified that it would cost between $50,000 and $80,000 to determine whether there was further interior structural damage.

Dr. Jerry Householder ("Dr. Householder"), Lafayette's expert in construction and structural engineering, testified that there was no evidence of structural damage in the Building. However, Dr. Householder stated that he "hasn't seen any proof there is no structural damage."

Lafayette avows that the amount awarded by the jury for building damages exceeds the amount estimated by $50,000 because it presumes that the jury included the money to allow Mr. Sher to inspect for further structural damage to the Building.

The fact finder is allowed great discretion when awarding damages. "One injured through the fault of another is entitled to full indemnification for damages caused thereby." *Hornsby v. Bayou Jack*

Logging, 04-1297, p. 5 (La. 5/6105), 902 So_ 2d 361, 365. The injured party should have his property restored "as nearly as possible to the state it was in immediately preceding the damage . . . *Coleman v. Victor,* 326 So. 2d 344, 346 (La. 1976). "The amount of damages is dependant on the facts of each case." *Gulfstream Servs., Inc. v. Hot Energy Servs.. Inc.,* 04- 1223, p. 10 (La. App. 1 Cir. 3/24/05), 907 So. 2d 96. 103.

Mr. Sciarono testified that it would cost between $50,000 and $80,000 for Mr. Sher to inspect for interior structural damage to the Building. Given this testimony and the facts of the case *sub judice,* we do not find that the jury committed manifest error by including money for a structural inspection in the total building damages award as the jury may have determined that a structural inspection was necessary to properly restore the Building to its pre-Katrina condition.

AMOUNTS PAID

We End that Lafayette should not receive a credit for amounts paid because Mr. Leopold Sher testified that the two checks Lafayette issued to Mr. Sher, totaling $2,755.08, were never negotiated.

In sum, the jury heard the testimony of experts and adjusters regarding the Building. It was in a better position to evaluate credibility and weigh the evidence in correlation with the witnesses. Accordingly, we find that the jury did not commit manifest error or an abuse of discretion by awarding Mr. Sher $320,150 for building. damages.

ARBITRARY, CAPRICIOUS, & WITHOUT PROBABLE CAUSE

Lafayette maintains that it did not act arbitrarily, capriciously, or without probable cause by failing to timely pay Mr. Sher.

Statutes regarding the imposition of penalties on insurers for arbitrary and capricious conduct are penal in nature and must be strictly construed. *Maurice v. Prudential Ins. Ca.*, 02-0993, p. 9 (La. App. 4 Cir. I0/23/02), 831 So. 2d 38, 388. The applicable revision of La R.S. 22:658 states, in pertinent part:

> A. (1) All insurers issuing any type of contract, other than those specified in R.S. 22:656, R.S. 22:657, and Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950, shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest.
>
> (3) Except in the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim and of a claim for reasonable medical expenses within fourteen days after notification of loss by the claimant. In the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim within thirty days after notification of loss by the claimant. Failure to comply with the provisions of this Paragraph shall subject the insurer to the penalties provided in R.S. 22:I220.

(4) All insurers shall make a written offer to settle any property damage claim, including a third-party claim. within thirty days after receipt of satisfactory proofs of loss of that claim.

B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(I) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (AX2), when such failure is found to be arbitrary. capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of twenty-five percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, twenty-five percent of the difference between the amount paid or tendered and the amount found to be due . . . .

La. R.S. 22:658 The applicable version of La. R.S. 22:I220 states, in pertinent part:

A. An insurer, including but not limited to a foreign line and surplus line insurer, owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to

make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A:

(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

C. In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings .

La. RS. 22:1220.

The factfinder's determination that an insurer arbitrarily and capriciously handled a claim is a factual finding subject to the manifestly erroneous/clearly wrong standard. *Calogero v. Safeway Ins. Co. of La.*, 99-1625, p. 5 (La. 1/19/00), 753 So. 2d 170, 173. Mr. Sher, as the insured, bears the burden of proving the alleged arbitrary and

capricious behavior of Lafayette. *Warner v. Liberty Mut. Fire Ins. Co.,* 543 So. 2d 5II, 5I5 (La. App. 4th Cir. 1989). An insurer acts arbitrary and capricious when its willful refusal of a claim is not based on a good faith defense . . or is unreasonable or without probable cause." *Calogero,* 99- I625, p.5, 753 So. 2d at I73. "[I]f part of a claim for property damage is not

disputed, the failure of the insurer to pay the undisputed portion of the claim within the statutory delay will subject the insurer to penalties on the entire claim." *Warner,* 543 So. 2d at 515. Lafayette has an

> affirmative duty to verify, through a reasonable investigation whether a claim was actually excluded from coverage and when an insurer chooses to resist its contractual obligation based upon a supposed defense, which a reasonable investigation would have proved to be without merit, it acts at its peril and renders itself liable for statutory penalties and attorney's fees.

Deutschmann v. Rosiere, 02-2002, p. 6 (La. App. 4 Cir. 4/9103), 844 So. al 1082, I086. Further,

> [a]n insurer must take the risk of misinterpreting its policy provisions. If it errs in interpreting its own insurance contract, such error will not be considered as a reasonable ground for delaying the payment of benefits, and it will not relieve the insurer of the payment of penalties and attorney's fees.

LeBlanc v. Undenvriters at Lloyd's, London, 402 So. 2d 292, 299 (La. App. 3rd I981), *quoting Carney v. Am. Fire and Indem. Co.,* 371 So. 2d 815, 819 (La. 1979).

ADJUSTMENT INITIATION WITHIN THIRTY DAYS

Lafayette states that it did not receive notice of Mr. Sher's claim until October 5, 2005, when the claim was assigned to Mr. Jones, a claims adjuster working for PLC through his company, Robert's Construction. Lafayette further asserts that Mr. Jones telephoned Mr. Sher on October 9, 2005. but did not speak with him. Mr. Jones testified that he made arrangements to inspect the Building on November 1, 2005.

Mr. Leopold Sher testified that he "notified" Lafayette of Mr. Sher's loss sometime during the first two weeks of September 2005. He stated that Mr. Jones spoke with him in October 2005. However, the Building was not inspected until November 1, 2005.

Loss adjustment initiation "requires that 'the insurer take some substantive and affirmative step to accumulate the facts that are necessary to evaluate the claim.' *Holler v. State Farm Mut. Auto. Ins. Co.*, 01-0592, p. 4 (La. App. 4 Cir. 10/3I/0I), 799 So. 2d 793, 797, *quoting McClendon v. Economy Fire & Cas. Ins. Co.*, 98-1537, p. 7 (La. App. 3 Cir. 4/17/99); 732 So. 2d 727, 731. Merely opening a *file* on a claim does not satisfy the statutory requirements. *Holier*, 01-0592. p. 5, 799 So. 2d at 797.

Considering the conflicting testimony from Mr. Leopold Sher and Lafayette as to the date Lafayette received notice of Mr. Sher's claim we cannot say that the jury was manifestly erroneous in accepting Mr. Leopold Sher's date. Thus. the jury determined that Lafayette did not initiate Mr. Sher's claim within the requisite thirty days due to the November 1, 2005, inspection date.

BUILDING DAMAGES CLAIM

Acknowledging that the Building suffered some wind damage due to Katrina, Lafayette asserts that it was not in bad faith because Mr. Sher did not submit sufficient evidence of all of the building damages claims. Additionally, Lafayette contends Mr. Scairono's estimates were not finalized. Lastly, Lafayette also maintains that the Building's damage was due to lack of maintenance.

Mr. Sher presented evidence that Lafayette inspected the Building in 1994, 2001, 2002, and 2003, during the Policy's term. All of the inspection reports contained documentation that Lafayette believed the property was well-maintained prior to Katrina.

Mr. Jones, the first adjuster, refused to assess damages to the basement level although Mr. Leopold Sher offered to show Mr. Jones the damage. Mr. Jones also testified that he did not assess the basement level. The record reflects that Mr. Leopold Sher repeatedly sent estimates and invoices to Lafayette to no avail.

Mr. Carubba testified that the Building was in very good condition considering its age. He stated that the Building cracked because it shook for two to three hours. Mr. Carubba testified that the cracks were white, which meant that the cracks were new and not made pre-Katrina.

Lafayette contends that Mr. Sher's building was not properly maintained. However, Mr. Vanderbrook a consulting engineer retained by Lafayette for inspection of the roof and interior of the Building, testified that he never said that damage was from a lack of maintenance. Mr. Vanderbrook also stated that he did not think the Building was poorly

maintained. Lafayette also ignored a letter from its parent agent, Stone Insurance, Inc. ("Stone"), which stated that Stone believed that the damage surveyed was caused by wind driven rain, which was covered by the policy.

After reviewing the evidence, we find that the jury did not commit manifest error in finding that Lafayette failed to conduct a reasonable investigation into Mr. Sher's building damages. This is documented by Lafayette ignoring the letter from Stone, the multiple Lafayette inspection documents, which stated that the Building was well maintained, and by Mr. Jones refusing to survey the damage to the Building's basement level. As such, we do not find that the jury, committed manifest error in finding that Lafayette was arbitrary and capricious when disputing Mr. Sher's claim regarding building damages.

LOST RENTS CLAIM

Mr. Sher claimed the lost rents for three of the apartments in the Building, including Apartment E located in the basement level, at post-Katrina valuations. Lafayette contends that Mr. Sher cannot use post-Katrina valuations for this claim. However, the Policy states that it covers the "actual loss of Business Income."

Both Mr. Sher and Mr. Leopold Sher testified as to the claim for lost rents. Mr. Sher rented two apartments post-Katrina for $1,400 each, resulting in his post-Katrina valuations. The only dispute regarded whether Mr. Sher was entitled to pre-Katrina or post-Katrina valuations. Therefore, Lafayette owed Mr. Sher $4,600 in undisputed lost rents. The record reflects that Lafayette never

tendered payment to Mr. Sher for that $4,600. Lafayette failed to pay an undisputed portion of Mr. Sher's claim, which means that Lafayette is subject to penalties on Mr. Sher's entire claim pursuant to *Warner*. Regarding the testimony presented, we find no manifest error in the jury's decision regarding Lafayette's arbitrary and capriciousness towards Mr. Sher's claim for lost rents.

BUSINESS PERSONAL PROPERTY CLAIM

Lafayette maintains that no bad faith exists as to Mr. Sher's claim for BPP because the Policy did not cover BPP and avers that Mr. Sher did not claim the BPP before litigation.

Mr. Sher asserts that whether his claim for BPP was disputed in good faith is irrelevant due to the fact that the failure to pay lost rents and property damage was in bad faith, which dictates that the trial court assess penalties on Mr. Sher's entire claim pursuant to *Warner*. We find that this argument has merit and pretermit a discussion on the dispute over BPP.

FLOOD CLAIM

Lafayette states that no Louisiana state court has found that flood damage is covered by a "non-flood policy." Mr. Sher states that the flood claim is a "non-issue" because the lost rents and property damages were not disputed in good faith. We pretermit the discussion as it is moot since we find that the trial court correctly granted Mr. Sher's motion for partial summary judgment regarding the ambiguity of the water exclusion.

Accordingly, we find that the jury did not commit manifest error in finding that Lafayette was arbitrary, capricious, or without probable cause when it handled and denied Mr. Sher's claims under the Policy.

LA. R.S. 22:658: PAYMENT AND ADJUST-MENT OF CLAIMS, POLICIES OTHER THAN LIFE AND HEALTH AND ACCIDENT; PERSONAL VEHICLE DAMAGE CLAIMS; PENALTIES; ARSON-RELATED CLAIMS SUSPENSION

Lafayette asserts the trial court erred by applying and submitting to the jury the amended version of La. RS. 22:658 effective at the time of trial. The amended version of La. R.S. 22:658(B)(1) increased penalties from twenty-five percent to fifty percent and added the award of attorney's fees and costs for arbitrarily and capriciously refusing to pay a claim within thirty days. The pre-amendment version of La. RS. 22:658 read, in pertinent part, as follows:

> B. (1) Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim, as provided in Paragraphs (A)(I) and (4), respectively, or failure to make such payment within thirty days after written agreement or settlement as provided in Paragraph (A)(2), when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the

> amount of the loss, of twenty-five percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars. whichever is greater. payable to the insured, or to any of said employees, or in the event a partial payment or tender has been made, twenty-five percent of the difference between the amount paid or tendered and the amount found to be due.

The jury instruction regarding La. RS. 22:658 was jointly submitted in its amended form to the trial court. However, Lafayette objected to the use of the amended form at trial.

"A trial judge has a duty to give instructions which properly reflect the law applicable in light of the facts of the particular case." *Berthelot v. Srallworth.* 03- 1771, p. 8 (La. App. 4 Cir. 9/14/04), 884 So. 2d 648, 653. Therefore, the trial court has a duty to present the correct law to the jury regardless of joint stipulated jury instructions. Louisiana Revised Statutes are not applied retroactively "unless it is expressly so stated." La. R.S. 1:2. Regarding retroactivity, the Louisiana Civil Code provides guidance La. C.C. art. 6, which reads:

> In the absence of contrary legislative expression. substantive laws apply prospectively only. Procedural and interpretive laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.

As La. R.S. 22:658 contains no language regarding retroactivity, we must determine whether La. RS. 22:658's penalty percentage, attorney's fees, and cost awards constitute substantive or procedural changes. *Patriot Am. Hospitality P 'ship, LP v. Mississippi*

Land Holdings, Inc., 06-0601. p. 5 (La. App. 4 Cir. 12/13/06), 948 So. 2d 249, 252, *citing Davis v. Willis-Knighton Med. Ctr.,* 32,193, p.3 (La. App. 2 Cir. 8/18/99), 738 So. 2d 1191, 1193.

A statutory amendment changing the percentage of permitted penalties is substantive and cannot be applied retroactively. *Francis v. Travelers Ins. Co.,* 581 So. 2d 1036, 1044 (La. App. 1st Cir. 1991). "Therefore, the time when the right to the penalty comes into existence determines which penalty percentage applies.- *Id., citing Gulf Wide Towing, Inc. v. F.E. Wright (UK) Ltd.,* 554 So. 2d 1347 (La. App. 1st Cir. 1989). "The right to a penalty comes into existence after the Passage" of the time period provided by the statute. *Francis.,* 581 So. 2d at 1354. Although the parties dispute the exact date Lafayette received notice of Mr. Sher's claim, it is undisputed that the thirty-day time period passed prior to the 2006 amendment to La. R.S. 22:658.

Thus, we find the trial court committed legal error by applying the amended version of La. R.S. 22:658. The trial court applied a fit, percent penalty and awarded $184,538.50 in penalties pursuant to La. R.S. 22:658. Therefore, the pre-amendment version of La. R.S. 22:658, which allowed for a twenty-five percent penalty, applies and the amount of penalties awarded to Mr. Sher is reduced to $92,269.25.

ATTORNEY'S FEES

Lafayette asserts that the trial court erred in awarding S258,728 in attorney's fees pursuant to La. C.C. art. 1997 and/or La. R.S. 22:658. As discussed above, if the attorney's fees were awarded based on *La.* R.S. 22:658, then we must eliminate the award

for lack of retroactivity. However, the award of attorney's fees may have a basis in La. C.C. art. 1997.

"An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform." La. C.C. art. 1997. The prevailing Louisiana principle states that "the right to recover attorney fees must be expressed by a statute or a contract." *Ratctiff v. Bovdell,* 93-0362, 92-0630 (La. App. 4 Cir. 4/3/96), 674 So. 2d 272, 282. *See also* La. RS. 22:1220. However, this Court opined that "attorney fees are not provided for in article 1997." *Priority E.M.S. v. Crescent City E.M.S.,* 01-2171, p. 18 (La. App. 4 Cir. 10/16/02), 829 So. 2d 1066, 1077. "Attorney's fees are not allowable in an action for breach *of* contract unless there is a specific provision therefor in the contract." *Rye v. Terminix Serv;. Co., Inc.*, 423 So. 2d 754, 757 (La. App. 4th Cir. 1982). "[P]arties have an opportunity to stipulate in the contract that attorney's fees would be due in the event the contract is breached." *Id.*

In the case *sub judice,* Lafayette and Mr. Sher did not include a provision in the Policy to award attorney's fees in case of a breach. Likewise, La. C.C. art. 1997 does not provide for the award of attorney's fees. Finally, because we find that La. R.S. 22:658 cannot be applied retroactively, we vacate the trial court's award of $258,728 in attorney's fees.

LEGAL INTEREST

The trial court awarded Mr. Sher interest from the date of judicial demand on damages and penalties. Lafayette avers that no legal interest should be permitted. However, if this Court finds legal interest applicable, Lafayette contends that it should be calculated from the date of judgment.

The timeline applicable for awarding legal interest is bifurcated based upon whether the award is for damages or attorney's fees/penalties. Interest on damages is calculated from the date of judicial demand. *Sharbono v Steve Lang & Son Loggers,* 97-0110 (La. 7/1/97), 696 So. 2d 1382, 1386. This prejudgment interest "is meant to fully compensate the injured party for the use of funds to which he is entitled but does not enjoy because the defendant has maintained control over the funds during the pendency of the action." *Id.* "However. 'penalty interest is entirely of the post-judgment variety, and thus is calculated only from the date the penalties are awarded until the date they are paid.' *Overton,* 05-1001, p. 23, 917 So. 2d at 418, *quoting Sharbono,* 97-0110, 696 So. 2d at 1389. *See Becnel v. Lafayette Ins. Co.,* 99-2966, p. 13 (La. App. 4 Cir. 11/15/00), 773 So. 2d 247_ 254.

Therefore, we find that interest is owed from the date of judicial demand on Mr. Sher's damage award of $351,727 and from the date of judgment on the penalty assessment of $92,269.25.

COSTS

Lafayette asserts there is no legal basis for the trial court's award of $42,020.24 in costs pursuant to La. C.C.P. art. 970 if this Court reduces Mr. Sher's awards to less than twenty-five percent more than his offer of judgment. La. C.C.P. art. 970 provides that costs may be awarded to the prevailing party by the trial court if the final amount awarded is at least twenty-five percent greater "than the amount of the offer of judgment made by the plaintiff-offeror." La. C.C.P. art. 970. "[The offeree must pay the offeror's costs, exclusive of attorney fees, incurred after the

offer was made, as fixed by the court." La. C.C.P. art. 970.

Mr. Sher made an offer of judgment on Lafayette on February 9, 2006, for $225,000 "inclusive of costs, interest, attorney fees and any other amount which may be awarded Plaintiff against Lafayette in this matter." Lafayette refused the offer. Considering the amount owed by Lafayette, "inclusive of costs, interest, attorney fees and any other amount," after this Court's adjustments exceeds It.. Sher's offer of judgment by at least twenty-five percent, we find no error in the award of documented costs pursuant to La. C.C.P. art. 970.

DECREE

Accordingly, we find that the trial court correctly granted Mr. Sher's motion for partial summary judgment in finding the water exclusion ambiguous. We find that the trial court did not commit legal error in striking additional defenses not specifically pled by Lafayette. Further, we do not find the jury committed manifest error in the awards for BPP, lost rents, or building damages. The trial court also

properly refused to admit jury instructions regarding damages for mental anguish. The jury did not commit manifest error by determining that Lafayette acted arbitrary, capricious, and without probable cause by refusing to pay Mr. Sher's claim. However, we find that the trial court erred by applying La. R.S. 22:658 retroactively and awarding attorney's fees. The trial court also erred in awarding legal interest on penalties from the date of judicial demand. The trial court did not err in awarding costs pursuant to La. C.C.P. art. 970.

Thus, the awards are amended as follows:

Building Damage Above the Basement	$175,850
Building Damage in the Basement	$144,300
Lost Rents	$17,350
Business Personal Property	$31,577
Penalties Pursuant to La. RS. 22:658	$92,269.25
TOTAL	$461,346.25
Costs Pursuant to La. C.C.P. art. 1920	$16,288.60
Costs Pursuant to La. C.C.P. art. 970	$42,020.24
Attorney's Fees Pursuant to La. C.C. art. 1997 and/or La. RS. 22:658	$0000.00
TOTAL	$58,308.84

Lastly, legal interest is due from the date of judicial demand on the damage award and from the date of judgment on penalties.

AMENDED IN PART; AFFIRMED AND RENDERED AS AMENDED

NO. 2007-CA-0757

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

JOSEPH SHER

VERSUS

LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.

TOBIAS, J., CONCURS IN THE RESULT AND ASSIGNS REASONS.

I respectfully concur in the result. Although I reach the same conclusions as the majority, I reach them differently because I disagree with the majority's analysis of the law and facts.

The Term "Flood"

I find the trial court's granting of the plaintiff's partial motion for summary judgment is error. I do not read the word "flood" in the contract of insurance as ambiguous at all. Rather, it is clear that the word "flood' applied to any and all floods.

The precise language in the contract of insurance excluding damages caused by flood is contained in

paragraph B., Exclusions, subpart 1.g. Water (I), to-wit:

> Flood, surface water, waves, tides, tidal waives, overflow of any body of water, or their spray, all whether wind driven by wind or not; . . . .

In context, it is clear that "flood" includes flood from any source whatsoever, including surface water, waves, et cetera. The greater includes the lesser. By analogy, in the sale of real estate, over time, authentic acts of sale of immovable evolved to frequently say, "I hereby grant, bargain, sell, convey, transfer, assign, set over, abandon and deliver. . . . No rational court today would hold that string of verbiage to be any different than if the vendor simply said hereby sell. . . .

Ultimately, however, the result in the case at bar is no different whether the majority or the trial court is correct or not in saying that flood does not include manmade floods. This is because Mr. Sher's premises sustained wind and water damage *first* from the force of the wind and rain of Hurricane Katrina. One may reasonably take judicial notice of this fact La. C.E. art. 201. After the winds had settled down and the rain slacked, the levees broke and inundated large portions of the city of New Orleans, including 1410 Broadway Street. From this follows the assumption that wind and rain caused damages to the interior of Mr. Sher's property, including the basement area, prior to the flood. The subsequent flood caused additional damage to the basement. But what portion of the damage to the basement was caused by wind and wind driven rain and what portion was caused by flood? This is a question of fact for the trier of fact, whether jury or judge.

Further, I take judicial notice that water evaporates, especially in heat. *Id.* In the days following Hurricane Katrina, water from the wind-driven rain and the flood waters (which included brackish and/or salt water) evaporated within Mr. Sher's property. But which water (rain or flood) caused what damage? Again, that is a question of fact for the trier of fact.

Nor should one automatically read a "concurrent causation" clause in a contract of insurance as an excuse for an insurer, such as one in the position of Lafayette Insurance Company ("Lafayette"), as an automatic ground to exclude coverage under a windstorm insurance contract. Again, a question of fact may exist, at least in the following context: Did the wind and rain cease or subside to a sufficient extent that the subsequent flood, although perhaps related to the wind and rain, constitutes a separate event such that reasonable minds could view them as non-concurrent?

In the case at bar, I can argue that the trial court's making a determination in advance of trial by the ruling on the motion for partial summary judgment that the term "flood" interdicted the jury's verdict so that this court would be required to conduct a *de novo* review of the record. *Anderson v. New Orleans Public Service. Inc.,* 583 So.2d 829 (La. 1991). In such a context, this court would be required to disregard the jury's verdict entirely and render judgment on the record on appeal.

I have conducted such a *de novo* review, and cannot say to an absolute certainty that the dollar amount of damages that I reach is different from that of jury. Reasonable minds differ. Accordingly, I do not

disagree with the majority's affirmation of the quantum of damages.

PLEADING OF AFFIRMATIVE DEFENSES

I respectfully disagree with the majority's conclusion that Lafayette did not adequately plead its affirmative defenses. As the majority notes, Lafayette's answer asserted the following:

> Lafayette adopts the terms, conditions, coverage, exclusions and endorsements of its policy, as if copied herein in extensio [sic], as a defense to petitioner's claims: Lafayette further pleads all defenses, exclusions, rights and remedies under the policy of insurance issued by Lafayette to petitioner.

La. C.C.P. art. 1005 defines affirmative defenses as follows:

> The answer shall set forth affirmatively arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, division, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality, injury by fellow servant, transaction or compromise, and any other matter constituting an affirmative defense. If a party has mistakenly designated an affirmative defense as an incidental demand, or an incidental demand as an affirmative defense, and if justice so requires, the court, on such terms as it may prescribe, shall treat the pleading as if there had been a proper designation.

Article 1006 of the Louisiana Code of Civil Procedure defines alternative defenses:

> An answer may set forth two or more defenses in the alternative, even though the factual or legal bases thereof may be inconsistent or mutually exclusive. All allegations in such cases are made subject to the obligations set forth in Article 863.

Our Code of Civil Procedure is crystal clear that [n]o technical forms of pleading are required." La. C.C.P. art. 854.

In my view, the paragraph of Lafayette's answer pleading the policy provisions as a defense is sufficient to raise all of the defenses that Lafayette needed to raise. That is, but for the contract of insurance between Joseph Sher and Lafayette, Mr. Sher would have no cause of action against Lafayette. Further, the precise language of La.C.C.P. art. 1005 does not list a policy of insurance as an item that must be specially pled as an affirmative defense. Accordingly, I find that *Dixie Savings & Loan Ass'n v. Pitre,* 99-154, (La. App. 5 Cir. 7/27/99), 751 So.2d 911, relied upon by the majority and holding that the pleading of a policy of insurance "in extenso does not meet the requirement of asserting an affirmative defense, as an incorrect statement of law. Rather, *Brantley v. State Farm Ins. Co.,* 37,601, (La. App. 2 Cir. 1/28/04), 865 So.2d 265, which held to the contrary of *Dixie Savings,* appears to me to be a more accurate statement of the law.[1]

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[1] A conflict in the circuit courts of appeal exists on this point of law.

In the alternative, I find that Lafayette's defense that its policy does not provide business personal property loss coverage was a negative defense and not an affirmative defense that Lafayette needed to specially plead. For example, *Keller v. Amedeo,* 512 So.2d 385 (La. 1987), the Supreme Court granted certiorari to determine whether, in an underinsured motorist case, the existence of additional liability insurance coverage covering the alleged underinsured motorist constituted an affirmative defense, which the UM carrier was required to set forth in its answer. In ruling that it did not, the Court distinguished between a "negative defense" and an "affirmative defense," stating that the latter raises a new matter, which, assuming the allegations in the petition to be true, constitutes a defense to the action and has the effect of defeating a plaintiffs demand on the merits. The Court further noted that, because the claimant must plead and prove lack of insurance in order to recover in a UM case, the UM carrier's attempt to disprove this fact neither raised a new matter (a matter *not* raised by the plaintiff's petition) nor constituted a defense that assumes the plaintiff's allegations to be true; rather, it was a negative defense, which sought to disprove an essential element of the claimant's theory of the case. *See also Alexander v. Cornett,* 42,147, p. 9 (La. App. 2 Cir. 7/11/07), 961 So.2d 622, 628.

By comparison, in the instant case, Mr. Sher pled in his petition, among other things, that he sustained damages to his business personal property, which damages he claimed were covered by the policy issued to him by Lafayette. In its answer, Lafayette acknowledged the existence of such a policy and further pled the policy, in its entirety, as a defense

and/or limit to Mr. Sher's ability to recover business personal property losses under the policy. Because Mr. Sher is charged with the burden of establishing every essential fact and to establish that his claim is within the policy's coverage *(see Mercadel v. Iran,* 92-0798 (La. App. 4 Cit. 3/29/94), 635 So.2d 438, 440), including his right to recover business personal property losses, Lafayette's attempt to disprove business personal property coverage by asserting the terms and conditions of the policy did not raise a new matter or constitute a defense that assumes Mr. Sher's allegations to be true, but merely sought to disprove Mr. Sher's allegations that the Lafayette policy cover his alleged business personal property losses. Therefore, Lafayette's defense that the policy it issued to Mr. Sher does not cover business personal property losses was not an affirmative defense Lafayette needed to specially plead; it was a negative defense that merely sought to disprove an essential element of Mr. Sher's theory of his case, *i.e.,* coverage for loss to his business personal property.

Nonetheless, whether determined to be a "negative defense" or "affirmative defense," the outcome remains the same. As I read the applicable policy provisions (quoted by the majority), because Lafayette's all-risk policy did not specifically exclude coverage for business personal property losses, I find that coverage was afforded under the policy as written.

OVERHEAD AND PROFIT

Lafayette complains that an award of 45% for overhead and profit is excessive. Actually, the 45% consists of 25% for overhead and profit and an additional 20% for contingencies. I agree with the majority that based upon the facts of this case, 25%

for overhead and profit was not (is not) excessive in the post-Hurricane Katrina period when finding competent contractors has been was difficult. Moreover, assigning 20% for contingencies and embracing expert testimony on that fact is not unreasonable and is within the trier of fact's discretion. The costs of material and labor in the post-Hurricane Katrina environment is not certain and can rise and fall with the scarcity or surplusage of either or both; unknown damage (hidden from an inspector's view) and discovered once repairs commence can be included in projected expenses of repairs. I don't find that the majority is incorrect in assessing, such amounts against the plaintiff,

WATER HAMMER

From the record on appeal, I cannot say that water hammer effects were or were not present and that a trier of fact, myself included, could award such damages in this case. Lafayette need not have pleaded same as an affirmative defense, instead relying upon the language of their policy of insurance.

STRUCTURAL DAMAGE

From the jurisprudence, a trier of fact has the discretion to believe or not believe whether structural damage was proven as existing more likely than not. As noted by the concurring opinion in *Grefer v. Alpha Technical,* 02-1237, (La. App. 4 Cir. 3/31/05), 901 So.2d 1117, the Louisiana Supreme Court affirmed an award of damages for contamination of a water aquifer when no evidence was present in the record that the aquifer had been contaminated by the defendant's operations. *See Corbello v. Iowa Production,* 02-0826, (La. 2/25/03), 850 So.2d 686. If

such be the law, a trier of fact does not err in awarding such damages and I find that the damages should be awarded on this record on appeal.

In sum, I respectfully concur in the result.

NO. 2007-CA-0757

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

JOSEPH SHER

VERSUS

LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.

CANNIZZARO, J., CONCURS IN PART AND DISSENTS IN PART

FLOOD COVERAGE

I respectfully dissent from the majority's failure to reverse the trial court judgment punting partial summary judgment in favor of the plaintiff, Mr. Sher, on the issue of flood damage coverage.

Specifically, I find no merit in the majority's conclusion that the term "flood" as utilized in the policy at hand is susceptible to different meanings thereby rendering the water damage exclusion inapplicable. The policy issued to the plaintiff by the defendant, Lafayette Insurance Company, provides in Paragraph B, Section (g)(1), relative to "Water Exclusions", that the defendant "*will not pay for loss*

or damage caused directly or indirectly *by* <u>*any*</u> of the following. Such loss or damage is excluded *regardless of any other cause or event. [F]*<u>*lood.*</u> surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all driven by wind or not. [Emphasis added]." Based upon my review, the term "flood", as well as the entirety of the exclusion, is clear and unambiguous. *See, Stewart Interior Contractors, L.L.C. v. Metalpro Industries,* L,L,C., 07-0251 (La. App. 4 Cir. 10/10/07),____So.2d___("Courts are not at liberty to alter the terms of insurance policies that are unambiguous."). See also, La. C.C. art, 2046 ("When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may he made in search of the parties' intent.") and La. C.C. art. 2049 ("The words of a contract must be given their generally prevailing meaning.").

The majority's analysis of the water damage exclusion is flawed in two respects. First, the majority errs in its conclusion that Section (g)(1) provides a restrictive list of the only events that constitute "floods". Next, the majority correctly notes that "flood" is not defined within the policy and, as such, must be given its generally prevailing meaning. However, rather than accepting the term in its traditional context and as clearly written, the majority rendered the exclusion ineffective on the basis there are "varying causes of floods."

The evidence clearly establishes Section (g)(1) was not intended in any way to be a definition of the word "flood". The clear wording of the provision states that the defendant will not compensate the plaintiff for "*any*" flood loss or damage, regardless of causation. Had the insurer intended to restrict the definition of

the term "flood- to certain events, it would have provided a restrictive definition of the word in the "Definitions" section of the policy, not in an exclusion.[1] It is unclear why the majority places emphasis on causation as the definitive criteria. Nonetheless, it is my steadfast conclusion that the origin of the flood, whether man-made or otherwise, is of no consequence due to the clarity and unambiguousness of the water damage exclusion. *See, Wickramasekra v. Associated Intern. Ins Co.,* 02-2474 (La. App. 4 Cir. 6/25/03). 890 So.2d 569, 573 ("[C]ourts have no authority to alter the terms of policies under the guise of contractual interpretation when the policy provisions are couched in unambiguous language.").

The evidence adduced in support of the partial summary judgment does not establish beyond dispute the ambiguity of the water exclusion and, as such, that the plaintiff was entitled to flood coverage. *Schroeder v. Bd. of Supervisors of La. State Univ.,* 591 So.2d 342, 345 (La. 1991) ("Because the mover has the burden of establishing that no material factual issue exists, *inferences to be drawn from the underlying materials before the court must be viewed in the light most favorable to the party opposing the motion [for summary judgment?* [Emphasis added]"). Consequently, the plaintiff failed to demonstrate that he was entitled to a judgment as a matter of law, and

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[1] Nor do I find the majority's reliance on La. R.S. §29:723. relative to the Homeland Security and Emergency Assistance and Disaster Act, to be applicable under the facts While the provision provides examples of types of disasters, it provides no guidance to the use of the word "flood" relative to the case at hand and, particularly, to the policy issued by the defendant (i.e., contract between the parties.).

as a result, the partial motion for summary judgment was erroneously granted.[2] Moreover, the lower court erred in awarding penalties to the plaintiff based on its improper determination that the defendant was arbitrary, capricious and without probable cause when it disputed the plaintiff's flood claim.

PLEADING OF AFFIRMATIVE DEFENSES AND BUSINESS PERSONAL PROPERTY COVERAGE

The defendant complains the trial court erred in precluding it from presenting defenses, with the exception of the water exclusion and payments made under the NFIP policy, on the basis that the exclusions were not specifically pled as affirmative defenses. The defendant only addressed in brief the trial court's failure to allow it to defend coverage claims for wind driven rain that entered through the plaintiffs windows and damages associated with the "water hammer" effect.[3]

It is undisputed that reliance upon an exclusion in an insurance contract is considered to be an affirmative defense, which must be set forth in an answer to a petition since it raises a new matter constituting a defense to an action. La. C.C.P. art, 1005; *Tudury v. Cooperative Cab Co.*, 265 So.2d 307 (La. App. 4th Cir. 1972). I agree with the majority's

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[2] For argument sake, even if the meaning of flood was limited to "natural", and not "man made, events, the lower court erred in granting summary judgment because there were genuine issues of fact with respect to the cause of the water inundation of the plaintiff's property (i.e., causation of levee breakage).

[3] Notably, the majority does not specifically address the trial court's failure to permit the defendant from asserting a defense to the wind driven rain claim.

general proposition that, as to those defenses that constituted new matters not raised in the plaintiffs petition, the defendant's answer containing broad based denials and assertions did not establish an adequate pleading of affirmative defenses as mandated by La. C.C.P. art. 1005. [4]

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[4] There is sparse jurisprudence, and none of which can be considered controlling, on the issue of the sufficiency of general denials of coverage and assertions of exclusions via the pleading of an insurance policy *in extenso* in answers to petitions. At first glance, it may appear there is a conflict in the circuits on the issue of whether a pleading of an insurance policy *in extenso* meets the requirement of asserting an affirmative defense.

The majority correctly relies on *Dixie Savings & Loan Ass'n v. Pine,* 99-154 (La. App. 5 Cir. 7/27/99), 751 So.2d 911, for the proposition that the pleading of a policy of insurance *in extenso* does not meet the affirmative defense mandate. In *Dixie,* the defendant asserted a broad based general defense in its answer without reference to any particular exclusion. Specifically, the defendant urged in his answer the "policy is its own best evidence and the provisions, exclusions, and limitations therein are pled herein as though copied in extenso." The court of appeal affirmed the trial court ruling precluding the defendant from asserting several defenses since they were not specifically raised as affirmative defenses in the defendant's answer.

It appears in the case of *Brantley v State Farm Ins Co.,* 37-601 (La. App. 2 Cir. 1/28/04), 865 So.2d 265 that a result similar to *Dixie* was suggested. In *Brantley,* the defendant's answer to the petition provided "defendant asserts all defenses under the policy, *including failure to cooperate, fraud, abandonment of the property and no inhabitants for 30 days before fire.* [Emphasis added)." The plaintiffs sought appellate review of the denial of their motion to strike premised on the inadequacy of the defendant's answer for failure to assert the affirmative defenses of failure to cooperate and abandonment. Without cuing reasons, the court found the answer was sufficient to deny the plaintiffs relief as to their motion to strike.

Applying this principle of law, I conclude the trial court mistakenly barred the defendant from contesting the claims relative to the wind driven rain and "water hammer" effect. The defendant sought to exclude these claims pursuant to Paragraph B, Section (g)(1), pertinent to "Water Exclusions", which is the same provision the trial court permitted the defendant to rely on to exclude flood coverage. Logically, the defendant did not have to plead an affirmative defense to the wind driven rain and "water hammer" effect claims since the water exclusion in the policy was already properly raised by the defendant and, as such, did not constitute a new matter not addressed in the petition.

For a different reason, I find the majority erred in its application of the rule relative to the pleading of affirmative defenses to the defendant's objection to the business personal property loss coverage. The plaintiff alleged the defendant issued a policy of insurance which entitles him to business personal property loss coverage for sustained damages. Specifically, he urged there was no evidence he rejected the property loss coverage. As a result, the plaintiff had the burden of establishing the facts that support his claim for policy coverage. While the defendant acknowledged the existence of the policy as a whole, it disputed the policy encompassed the coverage, not based on an exclusion, but rather as to the policy upon receipt from the underwriter. To disprove the claim, the defendant had to rely On the

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Thus, it may be logically concluded the qualifying language as to the specific defenses at issue that accompanied the general denial in *Brantley* was the pivotal factor for the sufficiency of the answer, Similar qualifying language was not present in the *Dixie* case and, thus, I conclude differentiates the two cases.

same policy terms, conditions, and declarations page the plaintiff relied on to seek recovery By denying the plaintiff was not insured for property loss coverage, the defendant did not raise any new issues not encompassed by the petition that would implicate the applicability of La. C.C.P. art, 1005. *See, Wimberley v. McCoy Tree Surgery Co.,* 33,761 (La. App. 2 Cir. 8/25/00), 766 So.2d 729 (crucial factor for the court was the fact both parties referred to the same that coverage as defined in the policy, and not any special exclusions at might apply).

Regardless of my opposition to the majority's finding regarding the pleading of the defense of business personal property coverage, I nevertheless conclude the outcome would be the same. A review of the record indicates that the policy does provide coverage for business personal property losses. Therefore, 1 concur in the result.

LOST RENTS

I agree with the majority that the plaintiff is entitled to post-Katrina valuation of lost rents. However, only insofar as it applies to Apartments A and C, which did not sustain flood damage. Based on my determination of the absence of flood coverage under the policy, the jury was manifestly erroneous in awarding loss rent for flood damage sustained to Apartment E. Nor do I find the defendant was arbitrary or capricious in disputing this claim, thereby rendering the imposition of penalties inappropriate.

BUILDING DAMAGES

I affirm the majority's finding of the lack of manifest error or abuse of discretion in the jury's assessment of damages for overhead and profit and

structural damage. as well as affirm the imposition of penalties for the defendant's arbitrary and capricious conduct when disputing these claims. As to the water hammer" effect claim, I can not say from the record what damages, if any, were awardable, in light of the trial court's erroneous failure to permit the defendant to present a defense. However, the defendant was not arbitrary or capricious in disputing these damages due to its inability to present a defense. Thus, the imposition of penalties relative to the "water hammer" effect was inappropriate.

PENALTIES, ATTORNEY'S FEES, LEGAL INTEREST AND COSTS

As stated, I disagree with the assessment of penalties against the defendant under La. R.S. 22:658 for alleged arbitrary and capricious conduct as to the issues of flood coverage, Apartment E lost rentals, and the "water hammer" effect. In all other respects, I affirm the award of penalties for the defendant's arbitrary capricious conduct and, as to those limited instances, the majority's application of the pre-amended version of La. R.S. 22:658 imposing a twenty-five (25%) penalty.

Nor do I dispute the majority's reversal of the award of attorney's fees. It is well recognized in the jurisprudence that as a general rule attorney's fees are not allowed except where authorized by statute or contract. *Maloney v. Oak Builders, Inc.*. 235 So.2d 386 (La. 1970).

In all other respects, I would affirm the judgment of the trial court. Finally, as to those issues wherein I affirmed the majority's award of damages, I also subscribe to the imposition of legal interest and costs.

Supreme Court, U.S.
FILED
DEC 27 2007
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No. 07-711

In The Supreme Court of the United States

IN RE KATRINA CANAL BREACHES LITIGATION
XAVIER UNIVERSITY OF LOUISIANA,

Petitioner,

v.

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit abuse its discretion in concluding that "the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal," and therefore denying Petitioner's motion to certify a question of insurance policy interpretation to the state supreme court?

CORPORATE DISCLOSURE STATEMENT

Respondent Travelers Property Casualty Company of America is an indirect wholly-owned subsidiary of The Travelers Companies, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
REASONS FOR DENYING THE WRIT	8
I. THE FIFTH CIRCUIT ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONER'S MOTION TO CERTIFY QUESTIONS TO THE STATE SUPREME COURT	8
II. PETITIONER'S ATTEMPT TO MANUFACTURE A CIRCUIT SPLIT IS WITHOUT MERIT	15
III. THE LOUISIANA COURT OF APPEAL DECISION IN *SHER* IS NOT GROUNDS FOR GRANTING CERTIORARI	20
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Am. Fid. Bank & Trust Co. v. Heimann, 683 F.2d 999 (6th Cir. 1982) 17

Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co., 352 F.3d 254 (5th Cir. 2003) 5

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 13, 14

Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222 (1998) 23

Bi-Rite Enters. v. Bruce Miner Co., 757 F.2d 440 (1st Cir. 1985) 17

Butner v. United States, 440 U.S. 48 (1979) 11

Cantwell v. University of Mass., 551 F.2d 879 (1st Cir. 1977) 13

Chaney v. Travelers Ins. Co., 249 So. 2d 181 (La. 1971) 21

Chevron USA, Inc. v. Vermilion Parish Sch. Bd., 377 F.3d 459 (5th Cir. 2004) 19, 22

Citizens Comm. for Better Law Enforcement v. Lafayette, 685 So. 2d 289 (La. Ct. App. 1996) 21

City of Burlington v. Indemnity Ins. Co. of N. Am., 332 F.3d 38 (2d Cir. 2003) 17

City of Houston v. Hill, 482 U.S. 451 (1987) 10

DiBella v. Hopkins, 403 F.3d 102 (2d Cir. 2005) 16

Doe v. City of Chicago, 360 F.3d 667 (7th Cir. 2004) 12

TABLE OF AUTHORITIES – Continued

Page

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) 11

Elkins v. Moreno, 435 U.S. 647 (1978) 13, 14

Fields v. Legacy Health Sys., 413 F.3d 943 (9th Cir. 2005) 16

Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004) 19

Jefferson v. Lead Indus. Ass'n, 106 F.3d 1245 (5th Cir. 1997) 12

Jennings v. BIC Corp., 181 F.3d 1250 (11th Cir. 1999) 16

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) 11

In re Katrina Canal Breaches Consol. Litig., 466 F. Supp. 2d 729 (E.D. La. 2006) 3

In re Katrina Canal Breaches Litig., 495 F.3d 191 (5th Cir. 2007) ..... *passim*

Lake Charles Diesel, Inc. v. GMC, 328 F.3d 192 (5th Cir. 2003) 19, 22

Lamar Homes, Inc. v. Mid-Continent Cas. Co., 428 F.3d 193 (5th Cir. 2005) 19

Lawrence v. Chater, 516 U.S. 163 (1996) 24

Lehman Bros. v. Schein, 416 U.S. 386 (1974) 9, 10

Local 514 Transport Workers Union of Am. v. Keating, 358 F.3d 743 (10th Cir. 2004) 16

TABLE OF AUTHORITIES – Continued

Page

McMillian v. Monroe County, 520 U.S. 781 (1997) 11

One Beacon Ins. Co. v. Don's Building Supply, Inc., 496 F.3d 361 (5th Cir. 2007) 19

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 11

Powell v. U.S. Fid. & Guar. Co., 88 F.3d 271 (4th Cir. 1996) 17

Savoie v. Fireman's Fund Ins. Co., 347 So. 2d 188 (La. 1977) 5

Schmude v. Sheahan, 420 F.3d 645 (7th Cir. 2005) 16

Schroeder v. Bd. of Supervisors of La. State Univ., 591 So. 2d 342 (La. 1991) 5

Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, 771 F.2d 1153 (8th Cir. 1987) 17

Sher v. Lafayette Ins. Co., 2007 WL 4247708 (La. Ct. App. Nov. 19, 2007) 6, 20-24

State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 15, 18

Thomas v. American Home Prods., Inc., 519 U.S. 913 (1996) 24

Tidler v. Eli Lilly & Co., 851 F.2d 418 (D.C. Cir. 1988) 13, 16, 18

Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) 13, 14

TABLE OF AUTHORITIES – Continued

Page

Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370 (6th Cir. 1995) 17

Travelers Indem. Co. v. DiBartolo, 171 F.3d 168 (3d Cir. 1999) 17

United States Fid. & Guar. Co. v. Park 'n Go of Georgia, Inc., 66 F.3d 273 (11th Cir. 1995) 18

In re Whitaker Constr. Co., 439 F.3d 212 (5th Cir. 2006) 5

Woodbridge Place Apartments v. Wash. Square Capital, Inc., 965 F.2d 1429 (7th Cir. 1992) 17

York Ins. Co. v. Williams Seafood of Albany, Inc., 223 F.3d 1253 (11th Cir. 2000) 18

STATUTES

La. Civ. Code art. 2046 4

La. Civ. Code art. 2047 4

TREATISE

17A Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4248 (1988) 12, 15

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner asks this Court to review the Fifth Circuit's decision not to certify a question of insurance policy interpretation to a state supreme court. There is no reason, let alone a compelling reason, to grant certiorari. There is no circuit split. No federal constitutional provision or federal statute is involved. Petitioner invokes only this Court's supervisory power, asking the Court to review a highly discretionary decision by a court of appeals. The Fifth Circuit acted well within its considerable discretion in determining that well-established principles of contract interpretation in the Louisiana Civil Code provided sufficient guidance for the Fifth Circuit to decide a straightforward question of insurance policy construction. Given that Petitioner chose to file this suit in federal court under diversity jurisdiction, it can hardly complain about the fact that a federal court of appeals decided a state law issue rather than certifying it. The petition for certiorari should therefore be denied.

STATEMENT OF THE CASE

Petitioner Xavier University of Louisiana is a large university located in the City of New Orleans. It purchased commercial property insurance coverage from Respondent Travelers Property Casualty Company of America, which was in effect when Hurricane Katrina struck on August 29, 2005. Petitioner's

buildings sustained some damage resulting from Hurricane Katrina's winds. During the hurricane, levees broke on several canals in New Orleans, resulting in large-scale flooding. Some of Petitioner's buildings were damaged by the floodwaters.

The insurance policy issued by Respondent covered loss caused by wind, but expressly excluded loss caused by "flood." Petitioner also purchased a separate flood insurance policy through the National Flood Insurance Program, but the limits were inadequate to cover the flood damage to Petitioner's buildings. Seeking to recover for both wind and flood damage, Petitioner filed this breach of contract suit against Respondent in the U.S. District Court for the Eastern District of Louisiana, which had jurisdiction based on diversity of citizenship.

In the district court, Petitioner filed a motion for partial summary judgment, seeking a ruling that the insurance policy covered the damage to its buildings caused by the massive inundation of New Orleans, notwithstanding the "flood" exclusion. As Petitioner put it, it was seeking coverage for "damages to Xavier's campus following Hurricane Katrina [that] were caused by ground water which came from the collapses of the 17th Street Canal and the London Avenue canal levees. . . ." Petitioner argued that the term "flood" should be interpreted as referring to a "natural" event, and that the levee breaches were caused by "non-natural" causes — human acts or omissions in the design, construction or maintenance of the levees.

Petitioner's motion for partial summary judgment was heard together with dispositive motions in other cases raising essentially the same issue.[1] The district court granted Petitioner's motion for partial summary judgment in part, holding that the term "flood" was ambiguous and should be construed as referring to "natural" events. *In re Katrina Canal Breaches Consol. Litig.*, 466 F. Supp. 2d 729, 766-67 (E.D. La. 2006), *vacated and remanded*, 495 F.3d 191 (5th Cir. 2007). The district court concluded, however, that there were genuine issues of fact in dispute with respect to the cause of the levee breaches. *Id.* at 767. The district court *sua sponte* certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at 780-81. Respondent filed a petition for permission to appeal in the Fifth Circuit, which granted review.

While the case was pending in the Fifth Circuit, Petitioner and other plaintiffs moved to certify the question presented to the Louisiana Supreme Court. These motions were carried with the case to be ruled upon by the merits panel. When it issued its decision on the merits, the Fifth Circuit denied the motions to certify, concluding that "[b]ecause the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this

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[1] There is another petition for certiorari pending in this Court in one of the cases that was heard together with the instant case in both the district court and the court of appeals. *See Chehardy v. Allstate Indem. Co.*, No. 07-713.

appeal, we decline the certification requests." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 208 n.11 (5th Cir. 2007).

The Fifth Circuit concluded, unanimously, that what occurred in New Orleans was clearly a "flood":

> [W]e conclude that the flood exclusions in the plaintiffs' policies are unambiguous in the context of the facts of this case. In the midst of a hurricane, three canals running through the City of New Orleans overflowed their normal boundaries. The flood-control measures, i.e., levees, that man had put in place to prevent the canals' floodwaters from reaching the city failed. The result was an enormous and devastating inundation of water into the city, damaging the plaintiffs' property. This event was a "flood" within that term's generally prevailing meaning as used in common parlance, and our interpretation of the exclusions ends there. The flood is unambiguously excluded from coverage under the plaintiffs' all-risk policies, and the district court's conclusion to the contrary was erroneous.

Id. at 196. In reaching this result, the Fifth Circuit applied the principles of contract interpretation set forth in the Louisiana Civil Code. The Code provides that "[t]he words of a contract must be given their generally prevailing meaning," and that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. Civ.

Code arts. 2046, 2047.[2] The Fifth Circuit applied the Code the same way the Louisiana Supreme Court does. The state supreme court has held that the "generally prevailing meaning" of a word is the meaning used in "common parlance" by "a reasonable person, a person in the street or an average citizen. . . . " *Schroeder v. Bd. of Supervisors of La. State Univ.*, 591 So. 2d 342, 346 (La. 1991). *See also Savoie v. Fireman's Fund Ins. Co.*, 347 So. 2d 188, 191 (La. 1977). As the Fifth Circuit held, there is no doubt that in common parlance what occurred in New Orleans was a "flood." *Katrina Canal Breaches*, 495 F.3d at 196.

Petitioner filed a petition for rehearing *en banc*, arguing, *inter alia*, that the panel erred in declining to certify the question presented to the state supreme court. Petitioner asked the *en banc* court to certify the question. Petitioner also moved to stay the mandate on the grounds that, in *Sher v. Lafayette Ins. Co.*, the Louisiana Fourth Circuit Court of Appeal was scheduled to hear oral argument on the applicability of a "flood" exclusion in a Hurricane Katrina case.

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[2] Louisiana is a unique civil law jurisdiction in which "the only authoritative 'sources of law are legislation and custom,'" and "courts must look first and foremost to the state's 'primary sources of law: the State's Constitution, codes, and statutes.'" *Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003). *See also In re Whitaker Constr. Co.*, 439 F.3d 212, 222 (5th Cir. 2006) ("In the civil law tradition, the Civil Code is the 'solemn expression of legislative will' to which our *Erie* obligation applies.").

Petitioner asked that the mandate be stayed until both the Louisiana Fourth Circuit and the Louisiana Supreme Court had issued decisions in *Sher*. The Fifth Circuit denied the petition for rehearing *en banc*, denied the motion to stay the mandate, and issued its mandate.

Following issuance of the mandate, discovery has continued in the district court. Petitioner filed several motions for partial summary judgment on other issues that it claims are closely tied to the interpretation of the "flood" exclusion. While those motions were pending, the Louisiana Fourth Circuit issued a decision in *Sher*. As explained in further detail herein, the *Sher* court did not issue a majority opinion on the "flood" exclusion. It voted 2-2 on whether the term "flood" was ambiguous, with one judge ruling that the term "flood" was unambiguous, but that the damage at issue was covered because it was caused by wind, and one judge concurring in the result without explaining her views. *Sher v. Lafayette Ins. Co.*, 2007 WL 4247708 (La. Ct. App. Nov. 19, 2007). After the *Sher* opinion came down, the district court denied Petitioner's motions for partial summary judgment, without prejudice to the motions being reurged after the Louisiana Supreme Court denies writs or issues a decision on the merits in *Sher*.

SUMMARY OF ARGUMENT

The only issue decided by the Fifth Circuit was a question of contract interpretation under Louisiana law. Petitioner does not ask this Court to review the issue decided by the Fifth Circuit because it knows that this Court does not, except in extraordinary circumstances, review decisions by the lower federal courts on issues of state law. In an effort to manufacture a "federal" issue, Petitioner argues that the Fifth Circuit erred in failing to certify a question of state law to the state supreme court. But that is a highly discretionary decision, dependent on a careful analysis of the state law issue on which certification is being sought. Petitioner fails to show that the Fifth Circuit committed any error, let alone such an egregious abuse of discretion as to warrant the exercise of this Court's supervisory powers.

This Court gives the courts of appeals considerable deference in deciding questions of state law, and, as part of that process, deciding whether to certify a question to a state supreme court. In making that decision, the Fifth Circuit and other courts of appeals consider all relevant factors, most importantly whether the applicable principles of state law are sufficiently clear. Petitioner does not challenge the criteria applied by the Fifth Circuit in exercising its discretion. While Petitioner attempts to suggest that there is a circuit split on the certification of questions to state supreme courts, there clearly is none.

In order to decide whether the Fifth Circuit abused its discretion, this Court would have to immerse itself in Louisiana contract law and its unique civilian tradition. Such an inquiry would, however, readily demonstrate that the Fifth Circuit acted well within its discretion. The question of whether the massive inundation of New Orleans at the time of Hurricane Katrina was a "flood" was governed by well-established, basic principles of contract law set forth in the Louisiana Civil Code and Louisiana Supreme Court decisions.

Petitioner also argues that the Fifth Circuit's decision conflicts with the decision by the Louisiana intermediate appellate court in *Sher*. But there was no majority opinion in *Sher*. The plurality opinion contains little reasoning and ignores the Fifth Circuit's decision. A non-precedential, evenly-divided and sparsely reasoned opinion of one of Louisiana's five circuit courts of appeal is not grounds for this Court to intervene.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONER'S MOTION TO CERTIFY QUESTIONS TO THE STATE SUPREME COURT

Certification of a question to a state supreme court is not governed by any federal statute or rule of procedure. Instead, it is a procedure that is made

available to the federal courts by some state courts of last resort, and is exercised by the federal courts in their discretion. This Court has long recognized that certification to a state supreme court is never "obligatory," and "in a given case rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). When a federal court decides to certify, the decision to answer a certified question, or decline to do so, rests entirely in the discretion of the state court. State statutes and rules of court vary considerably with respect to whether certification is permitted, the criteria for considering certification, and which federal courts can certify a question. It is a procedure that is highly discretionary in both the federal and state courts.

A court of appeals' decision on certification is inherently intertwined with its evaluation of the merits of the state law issue on which certification is sought. "[T]he use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of [this Court's] federal-state jurisprudence." *Id.* at 394 (Rehnquist, J., concurring). A decision on certification necessarily depends, in part, on how well-established the applicable principles of state law are, and the extent to which state appellate courts (or courts in other jurisdictions that may be looked to for guidance) have disagreed on the question presented. As then-Justice Rehnquist noted, "it would be unthinkable to any of the Members of this Court to

prescribe the process by which a district court or a court of appeals should go about researching a point of state law which arises in a diversity case." *Id.* "If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." *Id.*

As this Court has recognized, certification is not a panacea, and in some instances is clearly improper. "It would be manifestly inappropriate to certify a question in a case where . . . there is no uncertain question of state law whose resolution might affect the pending federal claim." *City of Houston v. Hill*, 482 U.S. 451, 471 (1987). For example, "[a] federal court may not properly ask a state court if it would care in effect to rewrite a statute." *Id.* While this Court has at times suggested that, on remand, it may be appropriate for a court of appeals to certify a question of state law, Petitioner fails to cite a single case in which this Court has ever ordered a court of appeals to use the certification procedure. It does not appear that this Court has ever done so.

The discretion this Court has given the courts of appeals on certification goes hand-in-hand with the considerable deference this Court accords the courts of appeals in deciding the merits of issues of state law. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is

located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004). *See also Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals."). The main reason for this is that "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than [the Supreme Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979).[3] Judges on the Fifth Circuit, for example, are well-versed in Louisiana's unique system of civil law. The members of the Fifth Circuit panel in this case collectively had 46 years of experience on the federal appellate bench, during which they have decided countless questions of Louisiana law.

The Fifth Circuit acted well within its discretion in concluding that "the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal. . . ." *Katrina Canal Breaches*, 495 F.3d at 208 n.11. The Fifth Circuit had no difficulty in applying the

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[3] *See also McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) ("Since the jurisdiction of the [Eleventh Circuit] Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738 (1989) ("We think the [Fifth Circuit] Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine [the state law issues in the case].").

Louisiana principles of contract law to decide whether the massive inundation of New Orleans was a "flood." Indeed, to the average citizen it seems preposterous that lawyers are even arguing about whether the inundation of New Orleans was a "flood." Petitioner fails to explain why the governing principles of contract law were so uncertain that this Court should exercise its supervisory power to grant certiorari, and then immerse itself in Louisiana contract law to determine whether the Fifth Circuit abused its discretion in denying certification. While the question before the Fifth Circuit was important to policyholders and the insurance industry, there is no requirement that all important questions be certified even if the applicable principles are clear.

Moreover, the Fifth Circuit was entitled to take into account the fact that Petitioner chose to sue in federal district court, knowing that a federal court would decide the issues of state law presented by the case. *See Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1248 (5th Cir. 1997) (noting that courts are "slow to honor a request for certification from a party who chose to invoke federal jurisdiction") (quoting 17A Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE § 4248, at 176 (1988).[4]

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[4] The courts of appeals frequently look with skepticism on a motion to certify by the party that chose to litigate in a federal forum. *See, e.g., Doe v. City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004) ("[I]t's not a proper alternative to proceeding in the first instance in state court to sue in federal court but ask that

(Continued on following page)

Petitioner relies on three decisions by this Court which are readily distinguishable. *Elkins v. Moreno*, 435 U.S. 647 (1978); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). In all three cases, there was a state law issue that, depending on how it was decided, might make it unnecessary to decide a question of federal constitutional law. In *Elkins*, this Court certified a question to the Maryland Court of Appeals based on the Court's "longstanding policy of avoiding unnecessary constitutional questions." *Elkins*, 435 U.S. at 661. Similarly, in *Arizonans*, the Court noted in *dicta* (after concluding that the plaintiffs had no standing) that the lower courts could potentially have avoided deciding whether an amendment to the Arizona Constitution was compatible with the U.S. Constitution if the Arizona Supreme Court had been offered the opportunity to construe the state constitutional provision. The Court explained that "[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks

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the suit be stayed to permit certifying the interpretive issue to the state court, thus asking that the suit be split between two courts."); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) (noting that the position of plaintiffs who brought suit in federal court "and when they saw the result, thought better of the state after all . . . could hardly have been made less compelling"); *Cantwell v. University of Mass.*, 551 F.2d 879, 880 (1st Cir. 1977) ("[O]ne who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification.").

friction-generating error if it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans*, 520 U.S. at 79.

In *Town of Castle Rock*, this Court avoided a federal constitutional question when it held that Colorado law did not provide the plaintiff with a right to police enforcement of a restraining order. The Court concluded that certification of that question to the state supreme court was unnecessary. *Town of Castle Rock*, 545 U.S. at 758-66 & n.5. Petitioner relies on the *dissent*, which concluded that the Court should have deferred to the Tenth Circuit's interpretation of Colorado law or, "barring that," should have certified the question to the Colorado Supreme Court. *Id.* at 778 n.6 (Stevens, J., dissenting) ("Both options that I favor — deferring to the Circuit's interpretation or, *barring that*, certifying to the Colorado Supreme Court — recognize the comparative expertise of another tribunal on questions of state law." (emphasis added)).

The federalism concerns that were implicated in *Elkins*, *Arizonans*, and *Town of Castle Rock*, where federal courts were asked to strike down a state statute or state constitutional provision on federal constitutional grounds, are not present when federal courts are interpreting state law in diversity cases. The diversity jurisdiction dockets of the federal courts of appeals would grind to a halt if they were required to certify to a state supreme court questions as straightforward as whether the massive inundation of a major city was a "flood." Litigants who, like

Petitioner, choose to sue in federal court assume the risk that the result they obtain from the federal court of appeals might not be the same result that other litigants obtain in state court.

II. PETITIONER'S ATTEMPT TO MANUFACTURE A CIRCUIT SPLIT IS WITHOUT MERIT

Petitioner tries to create a circuit split by citing instances in which courts of appeals have on occasion certified questions of insurance policy interpretation to state courts of last resort. But Petitioner has failed to show that there is any disagreement among the courts of appeals, let alone a well-developed disagreement that would require intervention by this Court.

In exercising its discretion on certification, the Fifth Circuit takes into consideration all pertinent factors. "The most important [factors] are the closeness of the question and the existence of sufficient sources of state law . . . to allow a principled rather than conjectural conclusion." *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir. 1976). The Fifth Circuit also considers, among other factors, "the practical limitations of the certification process; significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court." *Id. See also* 17A Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4248 (quoting *Shevin*'s description of the factors

that guide certification and noting that "the Fifth Circuit . . . has had by far the greatest experience with certification").

The courts of appeals are in agreement that the decision on certification is a highly discretionary, case-by-case determination, in which the court will consider all pertinent factors. For example, the D.C. Circuit has noted that "[t]he most important consideration guiding the exercise of this discretion . . . is whether the reviewing court finds itself genuinely uncertain about a question of state law that is vital to a correct disposition of the case." *Tidler*, 851 F.2d at 426. Similarly, the Second Circuit has stated that it "will not certify questions of law where sufficient precedents exist for us to make this determination"; rather, "[c]ertification is to be used in those cases 'where there is a split of authority on the issue, where [a] statute's plain language does not indicate the answer, or when presented with a complex question of [state] common law for which no [state] authority can be found.'" *DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (citations omitted). The Seventh Circuit considers "several factors . . . the most important of which is whether we feel genuinely uncertain about an issue of state law." *Schmude v. Sheahan*, 420 F.3d 645, 650-51 (7th Cir. 2005).[5]

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[5] Other circuits apply similar factors. *See Fields v. Legacy Health Sys.*, 413 F.3d 943, 958 (9th Cir. 2005); *Local 514 Transport Workers Union of Am. v. Keating*, 358 F.3d 743, 758 (10th Cir. 2004); *Jennings v. BIC Corp.*, 181 F.3d 1250, 1254 n.2 (11th

(Continued on following page)

Like the Fifth Circuit, other courts of appeals have concluded that where the governing principles of state law are sufficiently clear, there is typically no need for certification. *See, e.g., Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) ("Although Kentucky has not addressed the exact question at issue, it does have well-established principles to govern the interpretation of insurance contracts. Accordingly . . . we [] decline to certify it."); *Woodbridge Place Apartments v. Wash. Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992) (refusing to certify because "Indiana's general principles of contractual construction provide enough guidance").

The cases cited in the Petition fail to demonstrate any disagreement between the courts of appeals on certification, let alone a well-developed one. In *City of Burlington v. Indemnity Ins. Co. of N. Am.*, 332 F.3d 38 (2d Cir. 2003), the Second Circuit certified questions of insurance policy interpretation to the Vermont Supreme Court because it found that, in order to decide those questions, it would have to make "significant assumptions" about basic, fundamental principles of Vermont insurance law. *Id.* at 50. To use the terminology of its sister circuits, the Second

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Cir. 1999); *Travelers Indem. Co. v. DiBartolo*, 171 F.3d 168, 169 n.1 (3d Cir. 1999); *Powell v. U.S. Fid. & Guar. Co.*, 88 F.3d 271, 273-74 (4th Cir. 1996); *Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake*, 771 F.2d 1153, 1157 n.2 (8th Cir. 1987); *Bi-Rite Enters. v. Bruce Miner Co.*, 757 F.2d 440, 443 n.3 (1st Cir. 1985); *Am. Fid. Bank & Trust Co. v. Heimann*, 683 F.2d 999, 1002 (6th Cir. 1982).

Circuit was unable to find "sufficient sources of state law . . . to allow a principled rather than conjectural conclusion" and therefore found itself "genuinely uncertain about a question of state law that is vital to the correct disposition of the case." *Shevin*, 526 F.2d at 275; *Tidler*, 851 F.2d at 426. Here, in contrast, the Fifth Circuit did not need to make any assumptions about Louisiana law in applying the well-established principles of the state's Civil Code.

Petitioner also cites two cases in which the Eleventh Circuit certified questions of insurance policy interpretation to the Georgia Supreme Court. In *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 223 F.3d 1253, 1256 (11th Cir. 2000), the court of appeals found that two policy provisions were in conflict, that there were several reasonable interpretations, and that Georgia appellate caselaw provided insufficient guidance. In *United States Fid. & Guar. Co. v. Park 'n Go of Georgia, Inc.*, 66 F.3d 273, 277-78 (11th Cir. 1995), the court of appeals concluded that there were two seemingly inconsistent lines of Georgia Supreme Court authority on the basic question of when a court can look outside the four corners of a contract to ascertain its meaning. Here, unlike in *Williams Seafood* and *Park 'n Go*, the Fifth Circuit concluded that the applicable rules of contract interpretation in Louisiana were clear and well-established. *Katrina Canal Breaches*, 495 F.3d at 208 n.11. Petitioner does not seriously contend that the applicable principles of Louisiana law were unclear.

There is also no merit to Petitioner's attempt to create an "intra-circuit" split by suggesting that the Fifth Circuit's decisions on certification are inconsistent.[6] In all three cases relied on by Petitioner, there was disagreement between the intermediate appellate courts in Texas on the questions presented. *One Beacon Ins. Co. v. Don's Building Supply, Inc.*, 496 F.3d 361, 364 (5th Cir. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 428 F.3d 193, 197-98 (5th Cir. 2005); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 809-10 (5th Cir. 2004). Moreover, Texas, unlike Louisiana, is a common-law jurisdiction, which lacks the type of definitive contractual interpretation statutes that Louisiana has enacted in its Civil Code. In Louisiana, legislation is the primary source of law and judicial decisions are never binding until there is a series of decisions that rise to the level of *jurisprudence constante*. *See Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 462 (5th Cir. 2004) ("[A]lthough we may be guided by decisions rendered by the Louisiana appellate courts, we are not strictly bound by them, particularly when the jurisprudence has not developed to the status of jurisprudence constante (a series of decisions in accord on a given issue)."); *Lake Charles Diesel, Inc. v. GMC*, 328 F.3d 192, 197 (5th Cir. 2003) (noting that, in Louisiana, "judicial decisions acquire the force of law only when

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[6] If there were inconsistency in the Fifth Circuit's decisions, that might lead to *en banc* review, but would not warrant a grant of certiorari.

their numerosity and uniformity are sufficient to achieve the status of jurisprudence constante").

The Fifth Circuit's denial of the Petitioner's motion to certify was consistent with this Court's decisions and the standards for certification throughout the courts of appeals. The Fifth Circuit's decision to decline certification was also a permissible exercise of that court's considerable discretion. There is thus no reason, let alone a compelling one, to grant certiorari.

III. THE LOUISIANA COURT OF APPEAL DECISION IN *SHER* IS NOT GROUNDS FOR GRANTING CERTIORARI

The Petition also contends that the Fifth Circuit's decision conflicts with *Sher*, a Hurricane Katrina case in which the Louisiana Fourth Circuit affirmed a jury verdict requiring an insurer to pay for damage to the basement of the insured building, which the insurer contended was caused by flood. The five-member panel, however, could not reach a majority on the rationale for this result. The vote on the "flood" exclusion was 2-2 with one abstention. A two-judge plurality concluded, without much explanation, that the term "flood" was ambiguous. *Sher*, 2007 WL 4247708, at *4-5 (Love, J., joined by McKay, J.). One judge concluded that "it is clear that the word 'flood' applied to any and all floods," but then found, based largely on "judicial notice," that the damage to the basement was caused by wind, not flood, and

therefore was covered by the policy. *Id.* at *20-21 (Tobias, J., concurring in the result). One judge dissented from the portion of the opinion requiring the insurer to pay for the damage to the basement. He concluded that "the term 'flood,' as well as the entirety of the exclusion, is clear and unambiguous." *Id.* at *23 (Cannizzaro, J., concurring in part and dissenting in part). The fifth member of the court, Judge Murray, cryptically concurred only in the result, declining to explain her reasons or join any of her colleagues' opinions. *Id.* at *20 ("Murray, J., concurs in the result."). Judge Murray offered no indication of her view on the flood exclusion, leaving the court evenly split on that issue. Consequently, *Sher* only stands for a result — that the plaintiff, for whatever reason, is entitled to insurance coverage for water damage to his basement.

Because there was no majority opinion on the water damage exclusion in *Sher*, the decision has little precedential value. *Citizens Comm. for Better Law Enforcement v. Lafayette*, 685 So. 2d 289, 293 (La. Ct. App. 1996) (explaining that a plurality opinion "is of little value as precedent and should properly be limited to the facts of that case only"); *see also Chaney v. Travelers Ins. Co.*, 249 So. 2d 181, 184 (La. 1971) (explaining that there was no majority on a seven-member court where one justice concurred in the result and three justices dissented). This is especially true in Louisiana, where judicial decisions are never binding until they rise to the level

of *jurisprudence constante*. *See Chevron USA*, 377 F.3d at 462; *Lake Charles Diesel*, 328 F.3d at 197.

Petitioner does not even argue that the Fifth Circuit would reach a different result based on the non-precedential decision in *Sher*. The plurality opinion is unpersuasive, and fails to even acknowledge the Fifth Circuit's thorough opinion. The plurality reasoned as follows:

> A review of the Policy reveals that the parties intended to cover and include all risks that were not specifically excluded or limited. Lafayette failed to specifically exclude all floods because of the ambiguity contained within the water exclusion. While the Policy states that it does not cover damage caused by a "flood," it also states that it does not cover "waves, tides, tidal waves," and the "overflow of any body of water . . . whether driven by wind or not." This exclusion includes "flood," but then continues to list specific natural disasters that cause inundations of water, commonly labeled as "floods." For example, a varying cause of a flood can be man-made or natural, as documented in La. R.S. 29:762, which states that a flood is a natural disaster.

Sher, 2007 WL 4247708, at *4.

This reasoning was persuasively rejected by two other judges on the *Sher* panel. As Judge Cannizzaro explained, the words "surface water, waves," etc. are "not intended in any way to be a definition of the

word 'flood,'" or otherwise restrict the meaning of "flood." *Id.* at *24 (Cannizzaro, J.). As Judge Tobias explained, "[t]he greater includes the lesser" and "[i]n context, it is clear that 'flood' includes flood from any source whatsoever, including surface water, waves, et cetera." *Id.* at *20 (Tobias, J.). To the extent that the plurality relied on the fact that the word "flood" was included in a list of "natural disasters" in a Louisiana homeland security statute, the plurality was grasping at straws. *See id.* at *26 (Cannizzaro, J.) (noting that the homeland security statute "provides no guidance to the use of the word 'flood' relative to the case at hand and, particularly, to the policy issued by the defendant (i.e., contract between the parties)."). Given the lack of persuasiveness of the plurality opinion, *Sher* can hardly be expected to persuade the Fifth Circuit that its lengthy and careful opinion was an incorrect prediction of how the Louisiana Supreme Court would rule. *See Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 249 (1998).

Sher in no way warrants an order granting the Petition, vacating the decision below, and remanding. This procedure, known as GVR, is "potentially appropriate" when "intervening developments, or recent developments that [this Court has] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. . . ."

Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam). While this Court has on occasion issued a GVR order where there is an intervening state supreme court decision that is squarely contrary to the decision of a federal court of appeals, *see, e.g., Thomas v. American Home Prods., Inc.*, 519 U.S. 913 (1996), it does not appear that this Court has ever issued a GVR order based on an intervening decision by a state intermediate appellate court, or based on the possibility that a state supreme court might decide the question. Even if an intermediate appellate decision could be grounds for a GVR order, there is no "reasonable probability" that the Fifth Circuit "would reject" its own thorough decision based on a non-precedential, 2-2 ruling by one of Louisiana's five circuit courts of appeal. This is particularly true here where the Fifth Circuit denied Petitioner's request to stay the mandate pending decisions by the Louisiana appellate courts in *Sher*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: December 27, 2007 Respectfully submitted,

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No. 07-711

IN THE

Supreme Court of the United States

XAVIER UNIVERSITY OF LOUISIANA,
Petitioner,

v.

TRAVELERS CASUALTY PROPERTY COMPANY OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
I. The Fifth Circuit's erroneous holding is not so "clear cut" as Travelers would suggest given the Louisiana Fourth Circuit Court of Appeal's contrary ruling in *Sher* that the term "flood" is ambiguous	3
II. The Louisiana Supreme Court has recognized the importance of the issues presented by the conflicting decisions in *In re Katrina* and *Sher* and has agreed to consider *Sher* on an expedited basis.	4
III. That Xavier initiated this litigation in federal court is not a basis for precluding it from seeking certification of important state law issues to a state's highest court.	5
IV. Louisiana's rules for insurance policy interpretation are as nearly well settled as those in Texas and other states	6
CONCLUSION	9

TABLE OF CONTENTS—Continued

APPENDICES Page

A. Order of Louisiana Supreme Court granting Application for Writs of Certiorari in *Sher v. Lafayette Ins. Co.*, No. 2007-CA-0757 ..... 1a

B. Letter from Louisiana Supreme Court dated January 11, 2008 setting oral argument in *Sher v. Lafayette Ins. Co.*, No. 2007-0757 ..... 3a

TABLE OF AUTHORITIES

CASES Page

Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004) 7

Fiess v. State Farm Lloyds, 202 S.W.3d 744 (Tex. 2006) 7

Jeferson v. Lead Indus. Ass'n, 106 F.3d 1245 (5th Cir. 1997) 5

Nat'l Bank v. Pearson, 863 F.2d 322 (4th Cir. 1988) 5, 6

Sher v. Lafayette Ins. Co., 2007 WL 4247708 (La. App. Nov. 19, 2007) 3

Tider v. Eli Lilly & Co., 851 F.2d 418 (D.C. Cir. 1988) 5

IN THE

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XAVIER UNIVERSITY OF LOUISIANA,
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REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner, Xavier University of Louisiana ("Xavier") submits this Reply Brief to the Brief in Opposition filed by Respondent, Travelers Property Casualty Company of America ("Travelers"), to Xavier's Petition for a Writ of Certiorari ("Petition"). The arguments raised by Travelers in its opposition are without merit. The central issue in this case is whether the United States Fifth Circuit Court of Appeals erred when it refused to certify the sole issue

of state law before it on appeal to the Louisiana Supreme Court when it was well aware that numerous state district courts had already ruled in a manner consistent with the District Court below and that at least one of these cases was making its way through the state appellate system.

Travelers' search for a similarly situated case misses the mark. This is not a typical lawsuit. Xavier's claim is one of thousands by individual insureds who filed suit against their insurers for coverage for damages resulting from the levee breaches. The sole issue of state law facing the Court of Appeals, whether a so-called "flood" exclusion applies to man-made events, is important to the citizens and businesses of southeast Louisiana who sustained catastrophic damages when the levees surrounding the city of New Orleans failed resulting in a massive inundation.

In their lengthy search for an answer to these issues, these citizens have been presented with conflicting answers to their questions, a result that, much like the levee failures, was entirely avoidable in the present case. Given the significance of the issues presented, a unified voice on an unanswered question of Louisiana was possible. Indeed, the Louisiana Supreme Court has now recognized the significance of the issue: it has scheduled oral argument on this issue for **February 26, 2008**, less than two months after the court was asked to consider the issue. In the case below, the Court of Appeals erred when it refused to follow the precedent of this Court, the guidance of other Courts of Appeals, and its own precedent when it refused certification of this matter to the Louisiana Supreme Court. Xavier's Petition should, therefore, be granted.

I. The Fifth Circuit's erroneous holding is not so "clear cut" as Travelers would suggest given the Louisiana Fourth Circuit Court of Appeal's contrary ruling in *Sher* that the term "flood" is ambiguous.

Travelers suggests that granting Xavier's writ is not proper in this case because there is no "clear cut" intervening decision suggesting that the Fifth Circuit's opinion was in error. As noted in Xavier's Petition, the Louisiana Fourth Circuit Court of Appeal recently held that the term "flood" was ambiguous as a matter of law. *See Sher v. Lafayette Ins. Co.*, 2007 WL 4247708 (La. App. 4th Cir. 11/19/07). Travelers attempts to discount the effect of the *Sher* opinion, even going so far in one instance as to suggest that one of the judges on the panel "abstained" from the result. That did not happen. A five-judge panel heard the case. Two judges wrote an opinion expressing their belief that the term "flood" was ambiguous, and a third judge agreed with that result and concurred in the judgment. A majority of the court, then, concluded that the term "flood" is ambiguous and should be limited to exclude from coverage only naturally occurring events.

The fact that the result reached by the *Sher* court conflicts with the Fifth Circuit opinion below, which itself conflicted with the district court opinion, highlights the fact that the Louisiana Supreme Court must be the final arbiter of this issue. That the federal and state intermediate appellate courts in Louisiana have reached opposite conclusions on the same issue creates confusion and fosters only judicial inefficiency. The certification process is designed to eliminate such an occurrence. At the time of its

ruling, the Fifth Circuit was well aware of the potential for conflicting results and that Louisiana's state appellate courts would soon be considering the proper interpretation of the "flood" issue. Rather than defer to the Louisiana courts, however, the Court of Appeals made its own "*Erie*-guess" about Louisiana law. Insisting upon making a "guess" instead of simply certifying the issue is contrary to established principles of federalism and should be overturned.

II. The Louisiana Supreme Court has recognized the importance of the issues presented by the conflicting decisions in *In re Katrina* and *Sher* and has agreed to consider *Sher* on an expedited basis.

Following the Fourth Circuit's ruling in *Sher*, the defendant, Lafayette Insurance Company filed an application for Writ of Certiorari and/or Review with the Louisiana Supreme Court. The writ application was filed in December 2007, and we requested that the Court consider the application on a priority basis. On January 11, 2007, the Court issued an order granting Lafayette's writ application. *See Sher v. Lafayette Ins. Co.*, Order Granting Writ Application No. 2007-CA-0757, attached at Appendix 1a. The Court further advised that it would hear oral argument on this matter on February 26, 2008 following an expedited briefing schedule. *See* January 11, 2008 Letter from Louisiana Supreme Court, attached at Appendix 3a.

The Louisiana Supreme Court acted with diligence in scheduling oral argument in this matter less than two months after granting a request for a writ application. The Fifth Circuit, aware that the interpreta-

tion of the so-called "flood exclusion" would likely be presented to the Louisiana courts of appeal and the Louisiana Supreme Court chose not to certify the issue to the Louisiana Supreme Court. Its decision led to uncertainty and inefficiency and, for reasons stated herein and in Xavier's Petition, constituted a breach of its discretion.

III. That Xavier initiated this litigation in federal court is not a basis for precluding it from seeking certification of important state law issues to a state's highest court.

Travelers further erroneously contends that certification is not appropriate in this matter because Xavier is the party seeking the jurisdiction of the federal court. Those courts refusing certification on because of a litigant's choice of a federal form basis did so where the ***appellant*** was the party who had invoked federal court jurisdiction and sought a different result from the state court. This was the factual scenario before the Fifth Circuit in *Jefferson v. Lead Industries Association*, 106 F.3d 1245 (5th Cir. 1997), and the cases on which it relies for denying certification based on the appellants' invocation of federal jurisdiction. *See Jefferson*, 106 F.3d at 1248 & n.10. *See also Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988) (declining certification, in part, because the appellants "chose to litigate these claims before the district court, fully aware that neither of the relevant jurisdictions recognize the theories they were advancing."); *Nat'l Bank v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988) (refusing certification where the appellant had removed the matter to federal court after an adverse ruling of the state court that

he sought reconsideration of in federal court and on appeal).

Xavier is hardly a dis-satisfied litigant seeking certification after failing to persuade a district court to rule in its favor. Indeed, Xavier prevailed in its arguments to the District Court. Rather, Xavier requested certification so that this important issue may be decided by the Louisiana Supreme Court, which is the only court that will provide finality regarding the issues surrounding the proper interpretation of the water damage exclusion and end the confusion created by inconsistent rulings by the federal and state appellate courts. Travelers' suggestion that this Court should refuse certification simply because Xavier invoked federal subject matter jurisdiction is without merit in this case.

IV. Louisiana's rules for insurance policy interpretation are as nearly well settled as those in Texas and other states.

Finally, Travelers insists that the Fifth Circuit did not act contrary to its own precedent or that of other federal Courts of Appeals when it refused to certify issues of insurance policy interpretation to the Louisiana Supreme Court because the rules of interpretation are clearer in Louisiana than in other states. The fact that Louisiana is a civilian jurisdiction with codal principles setting the background for contract interpretation is irrelevant to a decision that certification was appropriate. All states have similar, established principles of insurance policy and contract interpretation, and numerous Courts of Appeals have concluded that certification is still appropriate given significant and unsettled questions of state law.

For example, in *Fiess v. State Farm Lloyds*, 392 F.3d 802 (5th Cir. 2004), the Fifth Circuit declined to make an *Erie*-guess about an unsettled issue of insurance policy interpretation and, "given the significance of the issue" certified the question of interpretation to the Texas Supreme Court. *See id.* at 811. The Texas Supreme Court accepted the certification and rendered its opinion on the policy. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006). In its introductory statements, the court noted that "the rules for construing insurance policies have been around for a long time, long before this dispute arose. Those rules require us to construe a policy according to what it says, not what regulators or individual insurers thought it said." *Id.* at 745.

The Texas Supreme Court introduced its discussion of legal issues by noting the following:

> ***The rules for construing this provision are well settled.*** If a policy provision has only one reasonable interpretation, it is unambiguous and we must construe it as a matter of law. If an exclusion has more than one reasonable interpretation, we must construe it in favor of the insured as long as that construction is not unreasonable. A policy provision is not ambiguous merely because different parties or different courts have interpreted it any differently.

Id. at 746 (emphasis added).

This pronouncement of well settled law is similar to the manner in which the Court of Appeals introduced its legal discussion in its opinion below. Thus, contrary to Travelers' unfounded assertions, Texas courts have established definitive guidelines for policy interpretation that are no less settled than those

principles in Louisiana. The fact that Louisiana's principles are enshrined in the Civil Code is of no moment. The Fifth Circuit in *Fiess* and the other cases cited by Xavier in its Petition had well established principles of insurance policy interpretation from the Texas Supreme Court on which it could have relied in determining the various matters before it; however, it still chose to certify the issue.

In *Fiess* and those cases cited by Xavier in its Petition, the Court of Appeals recognized the lack of guidance from the Texas Supreme Court and the importance of the legal issues before it. Rather than make its own guess as to the appropriate meaning of Texas law, the Fifth Circuit deferred to the Texas Supreme Court for a definitive and ultimate resolution of the issues.

The Fifth Circuit's refusal to follow its prior course of action in the present case is an abuse of discretion. The Fifth Circuit could have followed the Texas Supreme Court's "well established" and long standing legal principles and reached a decision in *Fiess*. Its decision not to do so resulted in greater judicial efficiency in the long run and avoids confusion by eliminating the specter of conflicting appellate results. The refusal to do the same in this case is an abuse of discretion that should not be countenanced.

CONCLUSION

For the foregoing reasons, Xavier respectfully requests that this Honorable Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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January 2008

APPENDIX

APPENDIX A

SUPREME COURT OF LOUISIANA

No. 2007-C-2443

JOSEPH SHER,

VS.

LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.

Granted: January 11, 2008

In Re: Joseph Sher and Lafayette Insurance Company, applying for Certiorari and/or Review, No. 06-9276, on the docket of the Civil District District Court for the Parish of Orleans, and No. 2007-CA-0757 on the docket of the Court of Appeal, Fourth Circuit, State of Louisiana.

And, whereas, the Court has this date, pursuant to Article 5, Section 5, of the Constitution of Louisiana, made and issued the following order, to wit— "It is ordered that the writ of review issue; that the District Court and the Court of Appeal send up the record in Duplicate of the case; and that counsel for all parties be notified."

Now, therefore, the said District Court and the Court of Appeal are hereby commanded, in the name of the State of Louisiana and of this Honorable Court,

to send up forthwith to this Court, at the City of New Orleans, the record in duplicate of the above entitled case.

Witness the Honorable Justices of the Supreme Court of the State of Louisiana, on this 11th day of January, in the year of our Lord, Two Thousand Eight.

John Tarlton Olivier
Clerk of Court

/s/ Katherine A. Fontana
KATHERINE A. FONTANA
Deputy Clerk of Court

APPENDIX B

STATE OF LOUISIANA,
New Orleans

No. 2007-C-2443

JOSEPH SHER,

vs.

LAFAYETTE INSURANCE COMPANY; UNITED FIRE & CASUALTY COMPANY; THE UNITED FIRE GROUP; ROBERT JONES; WES SWANK; FRED VANDERBROOK; AND PROPERTY LOSS CONSULTING, INC.

On Writ of Certiorari and/or Review to the Court of Appeal Fourth Circuit, No. 2007-CA-0757; Civil District Court, Parish of Orleans Division G, No. 06-9276, Hon. Robin Giarrusso, Judge Presiding

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Counsel for Respondent

The writ application in the above entitled matter has been granted and scheduled for oral argument in this Court on February 26, 2007. Therefore, briefing time is shortened.

Briefs on behalf of applicant are due on or before January 30, 2008 and briefs on behalf of respondent are due on or before February 19, 2008. In all other respects, the filing of the briefs are governed by Rule VII of the Rules of this Court.

John Tarlton Olivier
Clerk of Court

/s/ Katherine A. Fontana
KATHERINE A. FONTANA
Deputy Clerk of Court